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IN THE

Supreme Court of the United States

OCTOBER TERM - 1972

No. _____

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH,
for Exoneration from or Limitation
of Liability as Owner of the M/S BREMEN

UNTERWESER REEDEREI, GMBH
Petitioner,

v.

ZAPATA OFFSHORE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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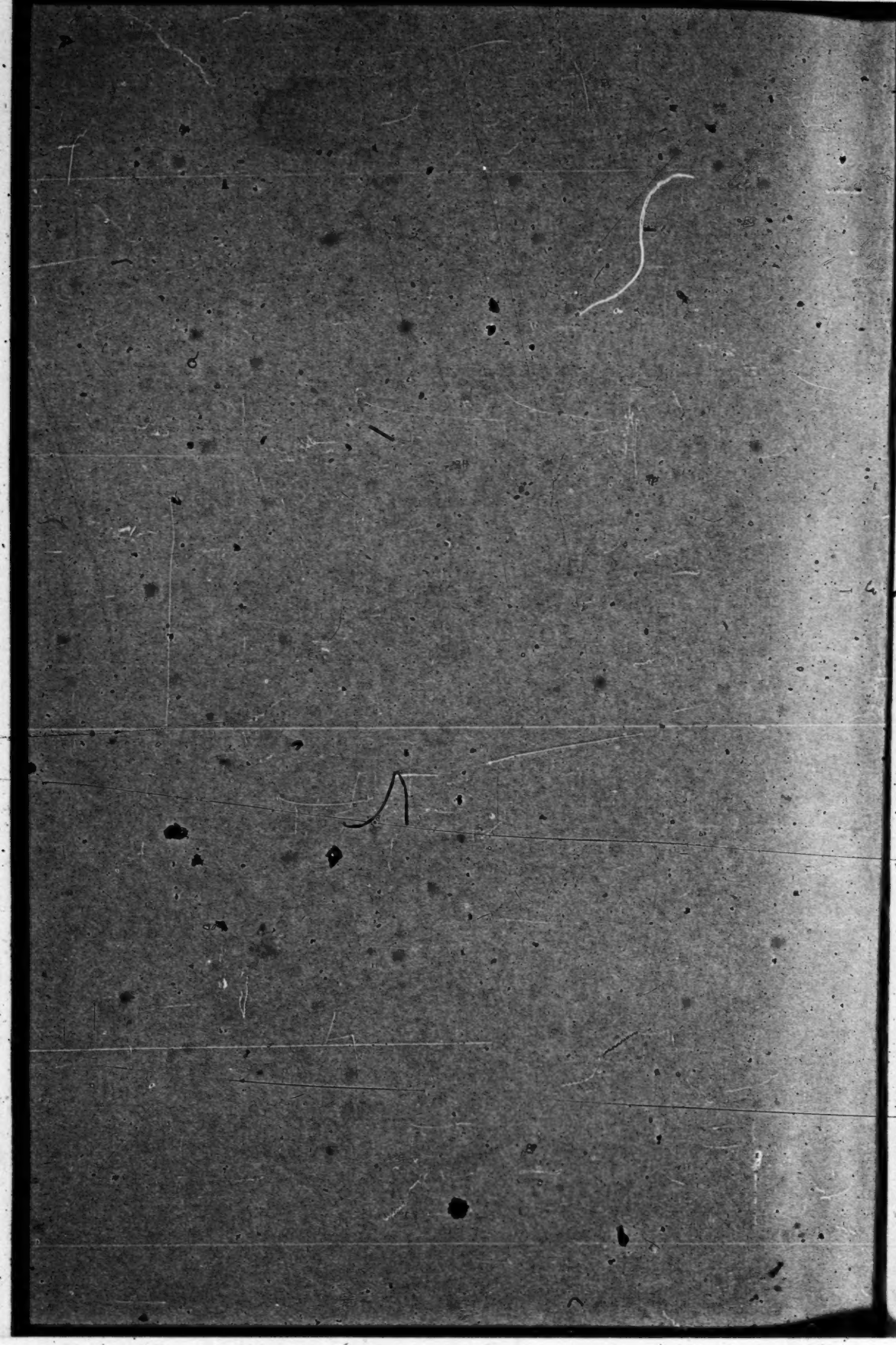

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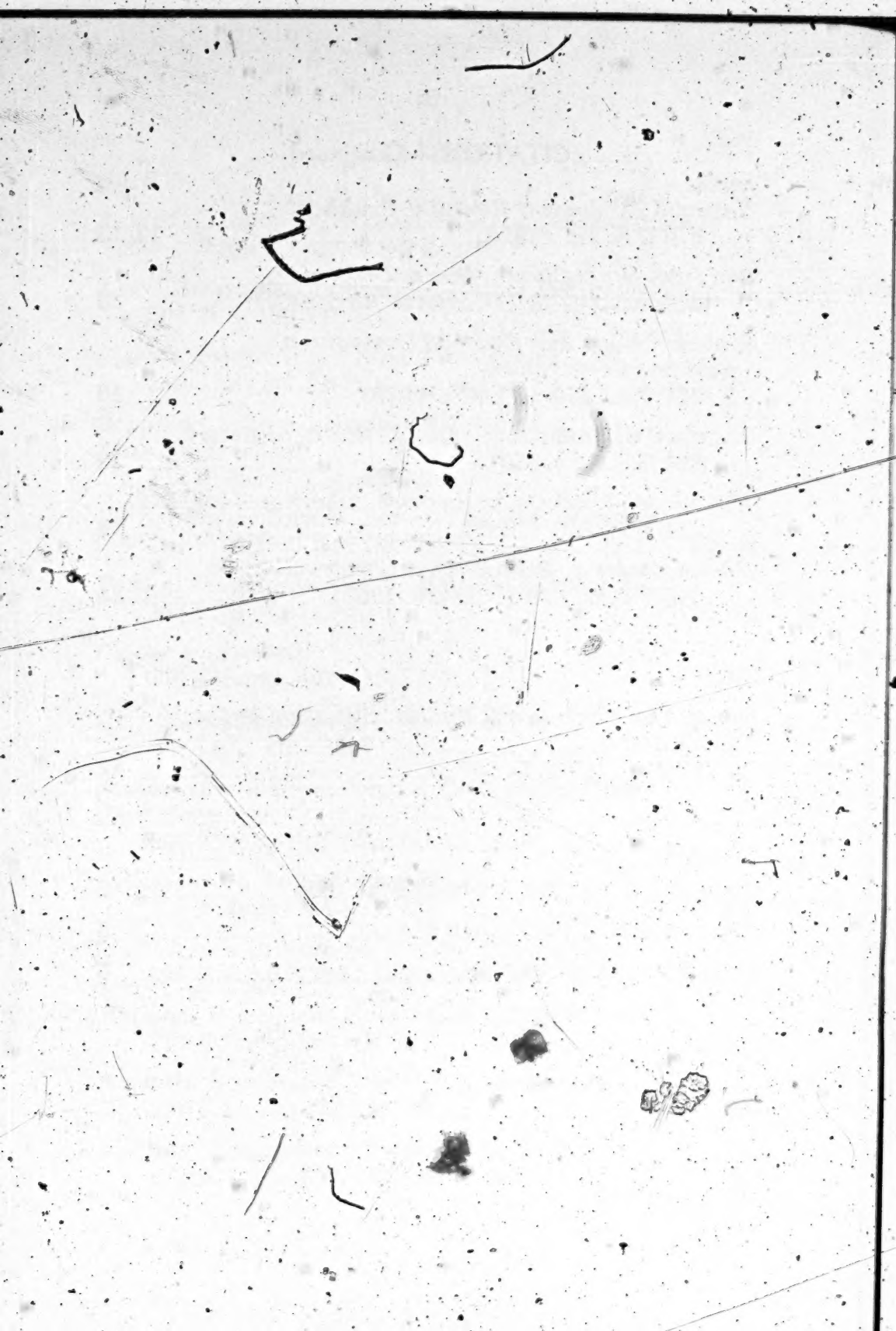

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, M/S BREMEN and UNTERWESER REEDEREI, GMBH, pray that a Writ of Certiorari Issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

Petitioners seek review of the decision rendered in the Matter of the Complaint of UNTERWESER REEDEREI, GMBH, for Exoneration from or Limitation of

Liability as Owner of the M/S BREMEN and UNTER-WESER REEDEREI, GMBH.-vs- ZAPATA OFFSHORE COMPANY, 428 F.2d 888 (5th Cir. 1970) Affirmed en banc, No. 27497, Slip Opinion June 28, 1971, F.2d . (*infra*, Appendices A and B.)

One of the Orders of the United States District Court for the Middle District of Florida is reported at 296 F.Supp. 733. The Orders, Findings of Fact and Conclusions of Law of the United States District Court for the Middle District of Florida are appended hereto. (*infra*, Appendices C and D.)

JURISDICTION

The decision sought to be reviewed herein was entered June 19, 1970. (Appendix A.) A timely Petition for Rehearing and Suggestion for Rehearing En Banc was granted by Order dated August 18, 1970. The opinion of the three-judge panel of the Court, rendered June 19, 1970, was adopted by the majority of the Court upon rehearing en banc June 28, 1971. (Appendix B.) This Petition for Certiorari was filed less than ninety days from the date of rehearing en banc. No extensions of time have been granted within which to petition for Writ of Certiorari.

Jurisdiction is based upon Title 28, USC § 1254 (1); c. 646, 62 Stat. 928.

QUESTIONS PRESENTED

The District Court refused to accede to the contractual choice of forum contained in the towage contract, to-wit: "any dispute arising must be treated before the London Court of Justice". This ruling was affirmed by

the United States Court of Appeals for the Fifth Circuit. It is respectfully submitted that the Opinion of the Court of Appeals is ambiguous and therefore presents the following questions:

1. Whether the selection of a forum for the resolution of disputes by parties of equal bargaining power contracting at arms-length is *per se* invalid as a violation of any legitimate public policy of the United States.

2. If the forum clause agreed upon by the parties in the instant case is merely unenforceable by virtue of being unreasonable, did the United States Court of Appeals for the Fifth Circuit commit fundamental error in determining that (a) the reasonableness of the forum provision can be determined solely by considerations of forum non-conveniens and (b) in holding that the *Petitioner had the burden* of showing the reasonableness of the stipulated forum.

STATUTORY PROVISIONS

The questions presented by this Petition do not arise under any specific constitutional provision, treaty, statute, ordinance or regulation of the United States, but involve crucial determinations of the public policy of the United States; the judicial policy of the United States courts with respect to international transactions; and over-riding and controlling questions of international comity.

STATEMENT OF THE CASE AND FACTS

District Court Jurisdiction

This litigation began with a Complaint in Admiralty filed by ZAPATA against BREMEN and its owner,

UNTERWESER (hereinafter the "initial action"). ZAPATA'S Complaint prayed for damages sustained by the barge CHAPARRAL which were allegedly caused by the negligence of UNTERWESER and BREMEN while CHAPARRAL was in the tow of BREMEN en route to the Adriatic from Venice, Louisiana. (R. 1)[1]

UNTERWESER filed a motion in the District Court requesting that the Court decline jurisdiction of the cause or alternatively stay the prosecution of the cause pursuant to a forum provision contained in the Towage Contract executed by the respective parties. (R. 19) Before this motion was heard by the District Court, UNTERWESER initiated proceedings against ZAPATA in the High Court of Justice, London, England, in accordance with the Towage Contract.

Approximately one week prior to the expiration of the statute of limitations, and before the District Court had ruled on its motion, UNTERWESER filed its Complaint seeking exoneration from and limitation of liability (hereinafter the "limitation proceeding"). (R.85) The initial action of ZAPATA was thereupon stayed and four weeks later the District Court entered its Memorandum and Order in the initial action, refusing to decline jurisdiction or to stay the action as requested by UNTERWESER. (R.80) (Appendix C.)

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[1]References are to the documents contained in the printed Appendix to the briefs filed in the United States Court of Appeals for the Fifth Circuit which the Petitioner has requested the Court of Appeals to certify to the Supreme Court of the United States. The original record in this cause is not now available for certification since the same was destroyed in a recent fire in the office of the Clerk of the United States Court of Appeals for the Fifth Circuit. However, all records and documents necessary to a determination of the issues are reproduced in the printed Appendix.

ZAPATA filed a claim (R.102) and an answer (R.104) in the limitation proceeding and a motion for injunction praying that the District Court enjoin UNTERWESER from further prosecution of the action in the High Court of Justice. (R.118) UNTERWESER renewed its motion for stay in the limitation proceedings. (R.205) The District Court denied the motion for stay and instead enjoined UNTERWESER from pursuing the London action. (R.224) (Appendix D)

The jurisdiction of the District Court was predicated upon the Constitution of the United States, Article III, Section 2, and Title 28 USC § 1333, c.646, 62 Stat. 931 (amended), and 46 USC § 181, *et seq.*, c.43, 9 Stat. 635 (amended).

The Towage Contract

The Towage Contract was the product of an arms-length transaction ". . . made between two responsible corporations involved in an international trasaction." (Appendix A, p. 16, Wisdom, J., dissenting.) The voyage, contemplated by the Towage Contract, was to have traversed numerous jurisdictions from the Mississippi River to the Adriatic Sea and was, accordingly, to be subject to the intermittent civil jurisdiction of numerous sovereigns.

Before contracting for the tow of CHAPARRAL, ZAPATA solicited bids from several ocean-towing companies. UNTERWESER'S bid was the lowest. After being advised that its bid had been accepted, UNTERWESER was requested by ZAPATA to furnish a written towage contract for consideration. A contract was drafted by UNTERWESER in Bremen, Germany, and

sent to ZAPATA in Houston, Texas. In place of the usual provision for German jurisdiction which UNTERWESER ordinarily specifies in its contracts, as well as the application of German law, UNTERWESER specified an English forum and English law ". . . as a reasonable compromise with an American firm in a transaction requiring an oil rig to traverse the Gulf of Mexico, the Atlantic, the Mediterranean, and the Adriatic." (Appendix A, p. 16, Wisdom, J., dissenting.) After a consideration of the contract, ZAPATA made several changes, executed the contract and returned it to UNTERWESER. UNTERWESER accepted the contract and finally executed it in Bremen on November 3, 1967. (R.21; 62)

The Collapse of the CHAPARRAL

On January 5, 1968, BREMEN[2] departed Venice, Louisiana, and proceeded into the Gulf of Mexico with CHAPARRAL[3] in tow. The flotilla was en route to the Adriatic when, during the early morning hours of January 9, 1968, in international waters (R.22), the legs of the CHAPARRAL collapsed and fell into the sea. Thereafter, BREMEN rendered salvage services and, upon orders from ZAPATA, proceeded toward Tampa Bay, the nearest point of refuge.

Upon arriving in Tampa Bay on January 12, 1968, the BREMEN was arrested by the United States Mar-

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[2]A deep sea tug of 1200 gross tons, 7500 horse power, 178 feet in length, 40 feet in beam, built and registered in Germany in 1967. She was manned by a crew of 23 German nationals.

[3]A self-elevating drilling barge of 4,750 gross tons, documented at Houston, Texas, on January 2, 1968. While under tow, CHAPARRAL was manned by a crew and a Master of ZAPATA. CHAPARRAL is 180 feet in length and 205 feet in breadth; she is equipped with three legs, each 435 feet high.

shal and served with a copy of ZAPATA's Complaint seeking damages in the amount of $3,500,000 against BREMEN and UNTERWESER. (R. 7)

The Initial Proceeding

On January 29, 1968, UNTERWESER filed its Motion to Dismiss for Lack of Jurisdiction, or Alternatively, for Entry of an Order Declining Jurisdiction and/or Staying the Further Prosecution of [the Initial Proceeding]. (R. 19) This motion was predicated upon paragraph 8 of the General Towage Conditions of the Towage Contract which provided:

> Any dispute arising must be treated before the London Court of Justice. (R. 27)

On the same date the District Court heard argument upon a motion for protective order filed by UNTERWESER (R. 28); at that time the Court was orally advised that the questions raised in the motion to decline jurisdiction or stay the action would control the litigation.

The parties completed arrangement for release of the BREMEN. ZAPATA ultimately accepted a letter of undertaking in the amount of $3,500,000 and pursuant thereto, BREMEN was released from arrest on January 26, 1968.[4]

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[4]The letter of undertaking was issued under the signature of Lamorte, Burns & Co., Inc. One condition of the letter of undertaking was that UNTERWESER gave up no rights in connection with any defenses to the action by ZAPATA; specifically mentioned were rights of UNTERWESER to challenge jurisdiction and to petition for limitation of liability. (R. 17).

London Action

In accordance with the forum provision of the Towage Contract, UNTERWESER instituted an action against ZAPATA in the High Court of Justice in London.[5] On February 21, 1968, the High Court of Justice issued a writ of summons. The writ was served upon ZAPATA on March 14, 1968. (R. 46, 48) ZAPATA appeared in the London action and moved to dismiss the writ of summons. Its motion to dismiss was predicated upon three principal grounds: (1) that the English Court was not a convenient forum; (2) that proceedings between the parties had previously been commenced in the United States; and (3) that the writ was not properly served. The High Court of Justice ruled that the writ of summons had been properly served, that it had jurisdiction and that the action should go forward. (Opinion High Court of Justice, R. 206) ZAPATA immediately appealed the ruling of the High Court of Justice to the English Court of Appeal. The ruling was affirmed, the Court of Appeal held that the forum provision of the Towage Contract was reasonable and that no showing had been made by ZAPATA which would compel the Court to refuse to enforce the written agreement. (*infra*, Appendix E) (R. 215)

Limitation Proceeding

While ZAPATA was contesting the action in the High Court of Justice, the parties were preparing for argument on UNTERWESER's Motion to Decline Jurisdiction or for a stay of the initial action in the District Court. UNTERWESER presented the issue to the District Court as follows:

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[5]UNTERWESER's suit sought affirmative relief against ZAPATA for breach of the contract, damages for loss of towing gear and for towage hire due.

> The basic issue presented by Defendant's Motion is whether Plaintiff [ZAPATA] has rightfully brought suit in this Court. Rather than being strictly jurisdictional, the issue is whether Plaintiff can be permitted to proceed in this forum contrary to its contract obligation, to the prejudice of Defendant. The court must decide whether, in light of the law and circumstances of this case, it will give effect to the express contractual intent of the parties and thereby decline to exercise its jurisdiction. (R.44)

At oral argument, UNTERWESER advised the District Court of the initiation of the London action. UNTERWESER also offered that all security given to ZAPATA in the initial action would remain available to satisfy any relief granted in any action or counterclaim by ZAPATA in London. The District Court reserved ruling on UNTERWESER's Motion following oral argument on April 29th.

By July 2nd, UNTERWESER was confronted with expiration of the six-month period for filing of a limitation proceeding in the United States; *the District Court not having ruled on its motion to decline jurisdiction or for stay of the initial action.* The High Court of Justice had held that UNTERWESER's London action was properly brought and that Towage Contract should be enforced, but ZAPATA was appealing that decision. Faced with the possibility of adverse rulings in the District Court and in the English Court of Appeal, UNTERWESER reluctantly filed its limitation action. (R. 85) A bond for $1,390,000 was filed and the District Court entered an order in the limitation action staying the initial suit brought by ZAPATA. (R.94, 97)

On July 23rd, the English Court of Appeal affirmed the ruling of the High Court of Justice, (Appendix F) (R. 215), and on July 29th, the District Court ruled on UNTERWESER's motion to decline jurisdiction or for stay in the initial action; its Order denied the relief requested. (Appendix C) (R. 80)

After entry of the adverse appellate decision in the English proceedings, ZAPATA filed Motion for Injunction in the Tampa limitation proceeding seeking to enjoin UNTERWESER from further prosecution of the English action in the High Court of Justice. (R. 118) UNTERWESER again sought to enforce the forum provision of the Towage Contract by filing a Motion to Stay the limitation action pending determination of UNTERWESER's action against ZAPATA in the High Court of Justice. (R. 205)

The District Court, not viewing the provisions of the Towage Contract as relevant, denied UNTERWESER's Motion for stay and at the same time granted ZAPATA's Motion for Injunction. Pursuant to such Order, UNTERWESER was enjoined from the further prosecution of its action against ZAPATA in London (Appendix D) from which Order UNTERWESER appealed to the United States Court of Appeals for the Fifth Circuit.

The Opinion of the Court of Appeals

The opinion of the United States Court of Appeals for the Fifth Circuit is ambiguous with respect to the grounds for holding in *Carbon Black Export, Inc. v. The SS Monrosa,* 254 F.2d 297 (5th Cir. 1958) *cert. dismissed,* 359 U.S. 180, *rehearing denied,* 359 U.S. 999 (1959), reiterating the following passage as representing the "majority view" (Appendix A, p. 10, n.26):

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non-conveniens. Any consideration of such a question starts with the *universally accepted rule that agreement in advance of controversy, whose object is to oust the jurisdiction of the courts, are contrary to public policy and will not be enforced.* (emphasis supplied) (Appendix A, p. 10)

In addition to its reliance upon *Carbon Black's* holding of *per se* invalidity of forum provisions as against "public policy", the Court of Appeals struck down the forum clause as unreasonable (and thus unenforceable) on the basis of non-conveniens:

> It is within the sound discretion of the District Court to decline jurisdiction on the basis of forum non-conveniens. But apart from the forum selection clause itself the circumstances supported a retention and determination by the District Court. Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the District Court. (footnotes omitted)
> (Appendix A, p. 12)

Moreover, the Court of Appeals held that since Zapata was a United States citizen, "[t]he discretion of the District Court to remand the case to a foreign forum was consequently limited." The court further "noted" that there were *"indications"* that ZAPATA's substantitive rights would be "materially affected" if the dispute was litigated in an English Court since the Towage Contract contained certain "exculpatory provisions" which, according to the Fifth Circuit "... are apparently contrary to public policy and unenforceable

in American courts," (footnote omitted) (Appendix A, p. 13), relying upon Reese, *The Contractual Forum: Situation in the United States,* 13 Am.J.Com.L. 187, n.33 (1964):

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal *unfairly* with the plaintiff or would deny him relief to which he is entitled. (Appendix A, p. 14)

Upon rehearing, en banc, a dividend Court of Appeals affirmed per curiam and adopted the opinion of the original panel.

REASONS FOR GRANTING THE WRIT

1. The Fifth Circuit's decision conflicts with this Court's decision in *National Equipment Rental v. Szukhent,* 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964) and with decisions of the United States Courts of Appeal for the Second and Third Circuits.

The Fifth Circuit affirmed the order of the District Court enjoining UNTERWESER from prosecution of its action in London in accordance with the forum provision of the Towage Contract and refused UNTERWESER's Motion to Stay the Limitation proceeding[6] pending outcome of the London action. The Fifth Circuit relied upon its decision in *Carbon Black Export, Inc. v. The SS Monrosa,* 254 F.2d 297 (5th Cir. 1958) for the proposition that forum clauses are *per se* illegal and unenforceable as provisions designed to oust courts of their jurisdiction.

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[6]The limitation proceeding having been necessitated by the district court's failure to rule on UNTERWESER's Motion to Stay the Initial Action within the statutory period for filing a Limitation Petition. (Statement of Case and Facts, *supra;* p. 9; Appendix B, pp. 5-6, Wisdom, J., dissenting).

To the extent that the Fifth Circuit's decision holds that forum provisions are *per se* invalid and against public policy, it irreconcilably conflicts with this Court's decision in *National Equipment Rental v. Szukhent*, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964) wherein it is stated:

> The purpose underlying the contractual provision here at issue seems clear. The clause was asserted by the petition and agreed to by the respondents in order to assure that any litigation of the lease would be conducted in the State of New York. The contract specifically provided that 'This agreement shall be deemed to have been made in Nassau County, New York, regardless of the order in which the signatures of the parties shall be affixed hereto, and shall be interpreted, and the rights and liabilities of the parties here determined, in accordance with the laws of the State of New York,' and it is so, that as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether. (citations omitted) (375 U.S. 315-316)

This Court's recognition of, and the presumption of validity afforded forum provisions in *Szukhent*, has been followed by district courts in other decisions. The outmoded concept of ousting the jurisdiction of the court has not been applied in these decisions; rather, absent a statutory prohibition, forum provisions have been subjected to scrutiny only to determine whether or not under the circumstances of the particular case,

the provision in reasonable.[7] It is difficult to rationalize the Fifth Circuit's holding in view of the fact that the projected voyage at the time of contract was subject to numerous jurisdictions, and in view of the fact that the District Court obtained jurisdiction of the initial action solely through fortuitous circumstances; thus a rejection of the present forum clause as an attempt to "oust the jurisdiction of the court" is illogical.[8]

The Fifth Circuit attempts to find some support for its rejection of forum clauses in *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200 (1967) in which the Second Circuit overruled its prior decision in *Wm. H. Muller & Co. v. Swedish American Line, Ltd.*, 224 F.2d 806 (1955) which had held a forum provision (calling for resolu-

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[7] *See* e.g. *United States v. Roscoe-Ajax Construction Co.*, 246 F. Supp. 439 (N.D. Cal. 1965) (Miller Act prohibition); *National Equipment Rental Ltd. v. Centra Cast Co.*, 270 F. Supp. 999 (E.D.N.Y. 1966) (forum provision valid and enforceable); *Geiger v. Keelani*, 270 F. Supp. 461 (E.D.Mich. 1967); *National Equipment Rental Ltd. v. Saunders*, 271 F. Supp. 756 (E.D.N.Y. 1967) (forum provision not per se invalid); *San Juan Hotel Corporation v. Lefkowitz*, 277 F. Supp. 28 (D. Puerto Rico 1967) (forum provision enforceable); *Hawaii Credit Card Corp. v. Continental Credit Card Corp.*, 290 F. Supp. 848 (D. Hawaii 1968) (forum provision enforceable when reasonable); *Matthiessen v. National Trailer Convoy, Inc.*, 294 F. Supp. 1132 (D.Minn. 1968) (forum provision enforceable if reasonable); *Aamco Automatic Transmissions, Inc. v. Hagenbarth*, 296 F. Supp. 1142 (E.D. Pa. 1968) (forum provision enforced).

[8] As pointed out by Judge Wisdom in his Dissent on Rehearing (Appendix B, pp. 5-6) any contention that UNTERWESER voluntarily waived its right to assert the forum provision by filing the limitation action (Appendix A, p. 8) denies reality. Immediately following the arrest of the BREMEN, UNTERWESER asserted the primacy of the forum provision by filing its motion to dismiss, decline jurisdiction and/or stay prosecution and by initiating the London action. UNTERWESER was forced to file the limitation proceeding when the District Court failed to rule on its Motion until after the statutory period for filing the limitation action had run.

tion of disputes in a Swedish court) was valid under the Carriage of Goods by Sea Act, 46 USC §§ 1300-15 (COGSA). However, in overruling *Muller*, the Second Circuit in *Indussa* made it undeniably clear that its rejection of the *Muller* forum provisions was based solely upon the statutory prohibitions of COGSA and *not upon general principles of contract law*. 377 F.2d at 202. (See: Appendix A, pp. 24-25, Wisdom, J., dissenting)[9] That the Second Circuit in *Indussa* was not holding forum clauses *per se* invalid is made doubly clear when one refers to that circuit's holding in *National Equipment Rental Ltd. v. Reagin*, 338 F.2d 759 (2d Cir. 1964) wherein the Court characterized this Court's holding in *Szukhent* as evidencing ". . . a federal policy in favor of upholding such clauses. . .". 338 F.2d at 762.

The Third Circuit in *Central Contracting Co. v. Maryland Casualty Co.*, 367 F.2d 341 (1966) held that reasonable forum provisions in contracts are enforceable and that such provisions are not *per se* "an affront to the judicial power, which must be stricken down." 367 F.2d at 345.

The ambiguity of the Court's opinion arises from the fact that after the Court had utilized *Carbon Black* to strike down the forum clause, the Court sought to find additional support for its holding on two alternative grounds: (1) the presence of so-called "exculpatory pro-

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[9]COGSA applied to *Muller* as it undoubtedly applies to the Fifth Circuit's decision in *Carbon Black*. The majority's opinion in the Fifth Circuit fails to recognize COGSA's controlling effect upon the Second Circuit's holding in *Indussa*. The majority's opinion deals superficially with the result of the *Indussa* decision and consequently fails to heed *Indussa's* admonition that its holding was not dictated by general principles of contract law but solely by COGSA.

visions" in Towing Contract which ". . . are *apparently* contrary to public policy and unenforceable in American courts" (Appendix A, p. 13-14) (emphasis supplied); and, (2) the "discretion" of the District Court when faced with a forum clause which is "unreasonable" only from the standpoint of forum non-conveniens. (Appendix A, p. 12-15)

The majority conclusion that the so-called "exculpatory provisions" violated public policy is based upon the ". . . determining authority" (Appendix A, p. 36 n.29, Wisdom, J., dissenting) of *Bisso v. Inland Waterways Corporation,* 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955). (Appendix A, p. 13-14). As pointed out by Judge Wisdom in his dissent (Appendix A, p. 36-38) the question of "public policy" of the United States arises solely from fortuitous circumstances and ZAPATA's failure to abide by its contractual obligations. Moreover, *Bisso's* prescription is manifestly not so strong as to overcome the requirements of the *Erie* doctrine. *See: Seaboard Coastline Railroad Company v. Tennessee Corporation,* 421 F.2d 970 (5th Cir. 1970); (Appendix A, p. 36, Wisdom, J., dissenting)[10] Why then the imposition of this questionable federal policy on an arms-length international contract? The only basis presented by the Court's opinion was that:

> The District Court was entitled to consider that remanding ZAPATA to a foreign forum, with no practical contract with the controversy, could raise a bar to recovery by a United States citizen which his own convenient courts would not countenance. (Appendix A, p. 13-14)

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[10]Inequality in bargaining position, so ominously present in *Bisso* is manifestly lacking in the present case. (R. 21, 62) (Appendix A, p. 16-17, Wisdom, J., dissenting).

Any apparent "bar" to ZAPATA's recovery would not be the result of the application of principles violating any *valid* "public policy" of the United States, but would be the result of the studied dealings between the parties themselves in a free international market (surely ZAPATA would not qualify as a ward of the court). As stated by Judge Wisdom in his original dissent, Appendix A, p. 36:

> The question here is whether the fact that a towage contract is involved and the fact that we are sitting in admiralty requires us to outlaw a forum that might enforce exculpatory clauses.

In relying upon the concept of reasonableness as a basis for rejection of the forum clause, the Fifth Circuit cited the Third Circuit's decision in *Central Contracting Co. v. Maryland Casualty Company, supra*. While the Third Circuit in *Central Contracting* did require a standard of reasonableness which respect to forum provisions, it unequivocally held that the burden of proving unreasonableness was on the party seeking to annul the contractual provision. By applying the doctrine of forum non-conviens "... the standard for which is that the plaintiff's [ZAPATA] choice of forum 'should rarely be disturbed' unless 'the balance is strongly in favor' of the defendant", (Appendix A, p. 41, Wisdom, J., dissenting), *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947), the District Court and the Fifth Circuit have placed the burden upon UNTERWESER rather than ZAPATA, the party seeking to withdraw from the initial choice of forum.

If the Court's opinion stands for the proposition that forum provisions are *per se* invalid, then the opinion is in conflict with other cases. If the Court's opinion

stands for the proposition that forum provisions are enforceable if not unreasonable, then the decision is fundamentally erroneous in that the burden of proving unreasonableness was misplaced. In either event, the Fifth Circuit's opinion conflicts with opinions of this Court, the Second and Third Circuits. It is respectfully submitted that the foregoing conflicts justify the grant of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

2. In the interest of international trade, commerce and comity, The Supreme Court should determine the conditions under which forum provisions in international contracts will be honored, if at all, in United States courts.

The decision of the Fifth Circuit will have the effect of fostering both uncertainty in the field of international commercial transactions whre the United States citizens are a party, and distrust of United States courts stemming from the application of outmoded concepts which ignore the parties' arms-length transactions in favor of a "judicial discretion" based upon a combination of national origin and fortuitous circumstances. Contrary to the Fifth Circuit's opinion, the initial choice of forum was the High Court of Justice and not the United States District Court; the former being an essential element of UNTERWESER's participation and undertaking (R. 22)—the latter a fortuitous circumstance. As stated by Judge Wisdom in his dissent on rehearing (Appendix B, p. 88):

> The decision of the majority is a backwards step by a forward-looking court. It has no place in a shrinking world where international commercial transactions are becoming increasingly commonplace. The safeguard against abuse of a forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the

burden of proving unreasonableness should fall on the parties seeking to escape from the obligation he contracted to undertake. ZAPATA has failed to show any good reasons for backing out of its bargain.

The Fifth Circuit's opinion in this cause will certainly do much to destroy the uniformity of international maritime law and relations which this Court has heretofore confirmed as "desirable". *Standard Oil Company v. United States,* 340 U.S. 54, 59, 71 S.Ct. 135, 95 L.Ed. 68 (1950); *Aetna Insurance Company v. United Fruit Company,* 304 U.S. 430, 58 S.Ct. 959, 82 L.Ed. 1443 (1938). (*See* Appendix A, p. 19, Wisdom, J. dissenting) The Court's decision does little to enhance any valid concepts of national or federal judicial sovereignty and at the same time negates by rendering uncertain the application of valid international commercial and judicial standards in American courts, and all but destroys valid concepts of comity which American courts, and especially federal courts, owe to courts of foreign countries. *See: Canadian Filters (Harwich) Limited v. Lear-Siegler, Inc.,* 412 F.2d 577 (1st Cir. 1969)

The Fifth Circuit's conclusion that "the discretion of the District Court to remand the case to a foreign forum was . . . limited" because "ZAPATA, . . . is a United States citizen" (Appendix A, p. 13) represents the end result of a distortion of the purpose of an *arms-length* forum clause as well as basic concepts of contract, jurisdiction and international comity. Moreover, the Court's opinion fails to suggest a factual basis for the inference (Appendix A, p. 14) that ZAPATA has been treated "unfairly" by the London Court of Justice or has been denied relief ". . . *to which he as (sic) entitled.*" The suggestion that ZAPATA'S rights would be prejudiced or that it would be treated "unfairly" if it

were subsequently held that ZAPATA must honor its contractual commitments which were freely and voluntarily made is a rejection of principles of international judicial comity. Again, the situation represented in this case is succinctly stated by Judge Wisdom in his original dissent (Appendix A. p. 38-39):

> ZAPATA's American citizenship may very well be an argument in some cases for refusing to decline jurisdiction on the basis of forum non-conveniens. *Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, __S.Ct.__, 94 L.Ed 1206, decided on forum non-conviens principles (no forum clause was mentioned) that it would not deny an American citizen his American forum primarily because there was no assurance that the defendant would appear with adequate security in the foreign court. Here, of course, UNTERWESER and ZAPATA have already joined argument in the English courts, the English courts have ruled that they have jurisdiction, and UNTERWESER has offered to post the same security that is available to ZAPATA here. The Supreme Court in Swift, moreover, expressly declined to decide the 'abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens.' 339 U.S. at 697, 94 L.Ed. at 1215. In this case we deal with a situation where ZAPATA voluntarily and specifically surrendered in the contract its right to proceed in American courts. *See Cerro de Pasco Copper Corp. v. Knut Knutsen,* 2 Cir. 1951, 187 F.2d 990, 991 *(Swift* "inapposite" in context of a forum clause). A proper solicitation for the Interests of American citizens may militate in favor of enforcing these clauses. *Otherwise, Americans who wish to contract with foreign nationals and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement.* (footnotes omitted) (emphasis supplied).

The reasonableness of a contractual forum provision arrived at through arms-length negotiation by parties regularly engaged in international transactions must not be determined through concepts of "convenience", national origin or pure jurisdictional "power". *See: Canadian Filters (Harwich) v. Lear-Siegler, Inc., supra,* at 578. As noted by Judge Wisdom in his dissent (Appendix A, pp. 32-34) ". . . where parties have selected a forum without the benefit of hindsight" or fortuitous circumstances, there are more relevant standards:

> "1. Did the parties freely and intelligently enter their agreement? * * *
>
> 2. Would the stipulated forum, in rendering its decision, transgress an *important* public policy of the present forum? * * *
>
> 3. Would the designated forum adjudicate the parties' dispute? * * *
>
> 4. Is the designated forum seriously inconvenient for the trial of the action?"

The uncertainty of the Fifth Circuit's opinion establishes a need for a clear enunciation of the standards to be applied with respect to enforcement of forum clauses in international maritime contracts. Among the issues and questions which must be clarified by this Court are:

1. The standards to be applied in determining the reasonableness of international forum provisions.

2. The degree of comity owed foreign courts whose jurisdiction has been invoked by a forum provision with respect to the *exercise* of jurisdiction by United States District Courts in the face of a contractual forum provision.

3. To what extent will United States courts impose its so-called "public policy" upon international commercial transactions?

4. Who will carry the burden with respect to the standards of reasonableness?

CONCLUSION

For the foregoing reasons a Writ of Certiorari should be issued from this Court to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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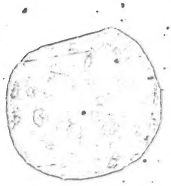

APPENDIX A

OPINION
OF THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI GMBH,
Defendants-Appellants

Appeal from the United States District Court for the Middle District of Florida

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(June 19, 1970)

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

GEWIN, Circuit Judge: Unterweser Reederei, GMBH (Unterweser), seeks review of an order of the district court denying a stay of the limitation action Unterweser had filed in that court and enjoining Unter-

weser from proceeding further with litigation concerning the same subject matter in an English court. The limitation action was brought after Zapata Off-Shore Company (Zapata) filed a complaint in admiralty againt Unterweser and its tug Bremen.

Unterweser, a German corporation, contracted with Zapata, a Delaware corporation, with its principal place of business in Houston, Texas, to tow Zapata's drilling barge 'Chaparral'[1] from Venice, Louisiana to Ravenna, Italy. The towage contract contained a forum selection clause providing that any dispute must be litigated before the High Court of Justice in London, England. On 5 January 1968, the Unterweser tug Bremen[2] departed Venice, Louisiana with the Chaparral in tow. During the morning of 9 January 1968, the Chaparral suffered a casualty while proceeding in the Gulf of Mexico. Pursuant to instructions from Zapata, Bremen made for Tampa Bay, the nearest port. Promptly upon arrival, Bremen was arrested by a United States Marshal and her master served with a copy of Zapata's complaint seeking $3,500,000 in damages from Bremen and Unterweser.[3]

Unterweser filed a motion praying in the alternative that the district court (1) dismiss for want of jurisdiction, (2) decline jurisdiction on the basis of forum non conveniens, or (3) stay further prosecution of the action.[4] Unterweser subsequently instituted an action

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[1]A self elevating drilling barge, 180 feet in length and 205 feet in breadth, of 4750 gross tons.

[2]A deepsea tug, 178 feet in length, 40 feet in beam, of 1200 gross tons and 7500 horsepower. Bremen was built and registered in Germany and manned by a crew of 23.

[3]Bremen was released from arrest on 26 January 1968, after Unterweser had furnished a letter of undertaking in the amount of $3,500,000.

[4]This motion was denied by the district court on 29 July 1968, after Unterweser had filed its limitation action. Unterweser sought to have this order certified in order to take an immediate appeal pursuant to 28 U.S.C. § 1292(b). The district court refused to certify the order, finding that the question had been mooted by the filing of Unterweser's limitation action and the consequent stay of Zapata's original action.

against Zapata in the High Court of Justice in London, claiming moneys due under the towage contract and damages for breach of contract. Zapata was served with the summons of that court; it appeared and moved that the English court dismiss its process. The High Court of Justice denied Zapata's motion holding that it had jurisdiction of the action. This determination was affirmed by the English Court of Appeal which held the forum selection provision of the contract to be reasonable and found no circumstances which would require it to deny enforcement of the agreement.

Before the English Court of Appeal had rendered the above decision, Unterweser filed a complaint in the district court seeking exoneration or limitation of liability arising from the casualty.[5] Consequently the district court entered the usual injunction restraining claimants from proceeding outside the limitation court regarding the events of 9 January 1968. Zapata filed its claim in the limitation proceedings asserting the same cause of action as in its original action. Unterweser filed objection to Zapata's claim and counter claimed against Zapata alleging the same claims embodied in its English action plus an additional salvage claim.

Zapata moved for an injunction restraining Unterweser from litigating further in the High Court of Justice. Unterweser moved to stay its own limitation proceeding pending a determination of Unterweser's suit in the English court. The district court denied the requested stay and enjoined Unterweser from proceeding in any other court regarding the same matter prior to a determination of the limitation action.[6] Unterweser appeals from these orders, and we affirm.

I

We shall first comment on the power of the district court to restrain Unterweser from proceeding with its

[5] See 46 U.S.C. § 185 *et seq.*

[6] In re Unterweser Reederei, GMBH, 296 F. Supp. 733 (M.D. Fla. 1969).

action in England. A court of equity has the traditional power to enjoin parties, properly before it, from litigating in another court. This power has been exercised where the foreign litigation would: (1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's in rem or quasi in rem jurisdiction; or (4) where the proceedings prejudice other equitable considerations.[7] We must now determine whether this traditional power of the Chancellor appertains to a district court sitting in a limitation proceeding.

Prior to the decision below there has been scant judicial discussion of the power of an admiralty court to enjoin a party bringing a limitation action from contemporaneous litigation in foreign courts. Our research has added little of significance to the authority cited by the district court. The principal decision on the question was rendered by the Second Circuit in *The Salvore*.[8] In that case, the owners of cargo damaged while on board the Salvore brought a libel in the district court. The Salvore's owner sued the cargo claimants in an Italian court for abuse of process, and subsequently brought a limitation proceeding in the district court. On a motion by the cargo claimants, the district court held that it was without power to stay the limitation proceeding or to compel the shipowner to discontinue its Italian suit. In reversing, the Second Circuit relied on the Supreme Court's description of a limitation proceeding as "the administration of equity in an admiralty court; look[ing] to a complete and just resolution of a many cornered controversy."[9] It stated:

> The limitation proceeding was an appeal to a court of admiralty, which is a court of equity, . . . and the appellee [shipowner], seeking equity, should will-

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[7] 7 J. Moore, Federal Practice § 65.19 (2d ed. 1953).

[8] 36 F.2d 712 (2d Cir. 1929).

[9] Id. at 713, quoting Hartford Acci. & Indemn. Co. v. Southern P. Co., 273 U.S. 207, 216 (1927).

> ingly do equity. . . . It must be willing to bring in all the controversies in the limitation proceedings, for it has invoked the court's aid.[10]

In *A. C. Dodge, Inc. v. J. M. Carras, Inc.*,[11] the Second Circuit relied on its *Salvore* decision in affirming an order of the district court disolving an injunction entered against claimants in the shipowner's limitation proceeding, and providing that it would be reinstituted only if the shipowner obtained a stay of an action which is was simultaneously pursuing in another federal court. Unterweser seeks to distinguish these cases on the ground that neither involved an injunction of the sort issued in the present case. In *Salvore* and *Dodge*, the courts sought to coerce the shipowner by conditioning the continuance of the injunction, that restrained claimants from litigating outside the limitation court, on voluntary forebearance of the shipowner's foreign action. We find no implication in these cases which would influence us to hold that district courts are impotent to accomplish directly what these courts sought to effect circuitously. To the contrary, the court in *Salvore* expressly stated:

> The court first securing jurisdiction has the authority and power of enjoining the parties to the litigation from proceeding in another jurisdiction.

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[10] 36 F.2d at 713. An analogous proposition is embodied in the decision of this court in Beal v. Waltz, 309 F.2d 721 (5th Cir. 1962). There, this court upheld the district court's refusal to modify its injunction to allow the shipowner to plead a favorable state court judgment as res judicata in the limitation proceedings he had filed in the district court. This court stated:

> There was no equity in the position of appellant. He could not successfully claim the right in the Federal limitation proceeding to restrain claimant in the state court suit, and still obtain the advantage of the litigation there . . . . 309 F.2d at 724.

[11] 218 F.2d 911 (2d Cir. 1955). This case arose from a collision in the Delaware River. Appellant shipowner filed a limitation petition in the United States District Court for the Eastern District of New York. The owner of the other vessel involved in the collision moved that the court dissolve its prior injunction because appellant was prosecuting a libel against it in Federal District Court in Maryland.

> And the court has an undoubted authority to control all persons and things within its own territorial limits.[12]

Unterweser emphasizes the third case of the trilogy cited in the district court's opinion, *Petition of A/S J. Ludwig Mowinckels Rederi*.[13] There the district court refused to enjoin litigation in an English court by a shipowner participating in a limitation proceeding before the district court. Though there is indication in the opinion that the *Mowinckels* court felt itself limited to the type of order fashioned in *Salvore* and approved in *Dodge*, we agree with the position of the district court below that *Mowinckels* was based on a determination that any restraint of the shipowner was improper under the attendant circumstances.

Since the district court entered its orders below, *Mowinckels* has been affirmed by the Second Circuit.[14] The opinion on appeal supports the interpretation given *Mowinckels* by the district court in the instant case. Citing *Salvore* and *Dodge* with approval, the Second Circuit stated:

> There can be no question . . . that one purpose of the Limitation Act is a concursus or concourse of claimants, and that in an appropriate situation the court may have power to enjoin persons within its jurisdiction with respect to their activities abroad.[15]

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[12] 436 F.2d at 714.

[13] 268 F. Supp. 682 (S.D. N.Y. 1967). The complex litigation involved in this case arose from a collision off the coast of France. Many of the claims were being litigated in England, and cargo claimants were proceeding with actions against both vessels in French courts. As the court below properly observed, the *Mowinckels* case was influenced by the fact that no one court could obtain control of the entire litigation arising from the collision.

[14] Petition of Bloomfield S.S. Co., ——— F.2d ——— (2d Cir.), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

[15] *Id.*

The opinion makes it clear that the district court's action was based on the equitable considerations of that case, and implies no general limitation on a district court's equitable powers in a limitation action.

> Concededly, the lower court could have restrained Mowinckels' continuance of its collision action in the English courts. But it declined to do so. We can find no fault in this decision. Under the circumstances of this case the lower court's decision was an appropriate exercise of its discretion.[16]

Unterweser also draws our attention to the proposition, quoted by the district court in *Mowinckels* from *British Transport Commission v. United States*,[17] that:

> "[N]o compulsion could be exerted on foreign claimants to file claims" and . . . "an injunction against suits being filed in foreign jurisdictions would be ineffective unless comity required its recognition."[18]

This practical observation is not pertinent to the present situation. Unterweser is not merely a potential claimant outside the jurisdiction of the district court; it is a party which has invoked, albeit reluctantly, that very jurisdiction. Though a domestic court has no power to restrain the courts of a foreign nation, it has admitted power to deal with litigants properly before it. An exercise of the latter power is not the assumption of the former.[19] With both Unterweser and substantial amounts of its assets before the district court, it need not resort to comity to enforce its order.

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[16] *Id.*

[17] 354 U.S. 129, 142 (1957).

[18] 268 F. Supp. at 690. Also see In re Bloomfield S.S. Co., 227 F. Supp. 615 (E.D. La. 1964), *aff'd sub nom.*, Bloomfield S.S. Co. v. Haight, 363 F.2d 872 (5th Cir. 1966), *cert. denied*, 386 U.S. 913 (1967).

[19] Steelman v. All Continent Corp., 301 U.S. 278 (1937); 7 J. Moore, *supra* note 4.

Unterweser also seeks to distinguish the foregoing authorities since none of these cases involved a forum selection clause. We are of the opinion that this clause is only relevant in determining whether the district court properly refused to stay the limitation proceeding, and, on the facts of this case, does not affect the power of the district court to grant injunctive relief. The implications of the forum clause will be considered in the next section of this opinion. For the moment we conclude that Unterweser's petition for limitation subjects it to the full equitable powers of the district court.[20] In a proper case, these include the power to enjoin a petitioning shipowner from litigating in a foreign forum. As this court observed in *Guillot v. Cenac Towing Co.*,[21] "In the Admiralty the Chancellor now goes to sea and has adequate equitable reserves."

II

Unterweser contends that the district court erred in refusing to stay the limitation action pending a determination of its English suit. It urges that the stay was required by the forum selection clause of the towage contract, which provides: "Any dispute arising must be treated before the London Court of Justice."

At this point it is helpful to pare two questions that are not involved in this appeal. The district court had jurisdiction of the limitation action. We do not understand Unterweser to seriously contend that this jurisdiction was defeated by the presence of the forum clause.[22] Neither are we asked to determine whether Zapata has breached the towage contract by filing the libel in the district court. The question we must decide

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[20]Petition of A/S J. Mowinckels Rederei, 268 F. Supp. 682, 689-90 (S.D. N.Y. 1967). *See* British Transp. Comm'n v. United States, 354 U.S. 129 (1957).

[21]366 F.2d 898, 904 (5th Cir. 1966).

[22]See 6A A. Corbin, Contracts § 1445 (1962). Also see note 35 *infra*.

is whether the district court was obliged to decline to exercise admitted jurisdiction under the facts of the present case.

In *Carbon Black Export, Inc. v. The SS Monrosa,*[23] this court reversed a order of the district court declining jurisdiction of a libel filed by a cargo shipper. The district court, relying on *Wm. H. Muller & Co. v. Swedish American Line, Ltd.,*[24] had upheld a forum selection clause contained in the bills of lading designating Genoa, Italy as the exclusive situs for legal proceedings,[25] finding that the libellant had not shown the clause to be unreasonable. This court held that the forum clause did not apply to *in rem* proceedings. In holding that the district court erroneously declined *in personam* jurisdiction over the shipowner, this court stated:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.[26]

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[23] 254 F.2d 297 (5th Cir. 1958), *cert. dismissed,* 359 U.S. 180, *rehearing denied* 359 U.S. 999 (1959)

[24] 224 F.2d 806 (2d Cir. 1955). In a cargo consignee's libel against the carrier, the Second Circuit held that a forum clause contained in the bill of lading should be respected unless shown to be unreasonable. See note 29 *infra.*

[25] The forum clause in *Carbon Black* provided:

> Clause 27 — Also, that no legal proceedings may be brought against the Captain or ship owners or their agents in respect to any loss of or damage to any goods herein specified, except in Genoa, it being understood and agreed that every other Tribunal in the place or places where the goods were shipped or landed is incompetent, notwithstanding that the ship may be legally represented there.

[26] 254 F.2d at 300-301. The position of this court in *Carbon Black* reflects what is apparently the majority view regarding forum selection clauses. Annot., 56 A.L.R.2d 300 (1957); 1 E. Benedict, Admiralty § 22a (6th ed. 1940, Supp. 1968).

This court professed no comment on the Second Circuit's decision in *Muller* distinguishing it on its facts. The Supreme Court granted certiorari to resolve an indicated conflict between *Carbon Black* and *Muller*.[27] In *SS Monrosa v. Carbon Black Export, Inc.*,[28] the Court dismissed the writ as improvidently granted though it approved this court's interpretation of the forum clause as having no application to *in rem* actions. Any remaining antagonism between the two opinions was relieved when *Muller* was overruled by the Second Circuit sitting en banc in *Indussa Corp. v. SS Ranborg*.[29]

In *Insurance Co. of North America v. N. V. Stoomvaart-Maatschappij*,[30] the district court was requested to decline jurisdiction on the basis of a forum clause which was more broadly drawn than the clause in *Carbon Black* and analogous to the provision in the instant contract.[31] In denying the request the court stated:

> Here the jurisdictional provision involved in Clause 22 refers to *"Any action,"* obviously referring to both *in personam* and *in rem* actions. Nevertheless, the Fifth Circuit's holding in Carbon Black is applicable and such an attempt to oust the Court of its jurisdiction in advance will be stricken herewith as being contrary to public policy and unenforceable.[32]

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[27] 358 U.S. 809 (1958).

[28] 359 U.S. 180 (1959).

[29] 377 F.2d 200 (2d Cir. 1967). The *Indussa* court held that *Muller* was inconsistent with the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315. COSGA also applied to the shipment in *Carbon Black*, but we are unable to read that case as applying only to such shipments.

[30] 201 F. Supp. 76 (E.D. La. 1961).

[31] The clause in Insurance Co. of N. Am. provided:
> Clause 22 — Any action with regard to any dispute or claim arising under this bill of lading and the contract evidenced thereby shall be brought before the Court at Amsterdam to the exclusion of any other court unless the Carrier appeals to another jurisdiction or voluntarily submits himself thereto.

[32] 201 F. Supp. at 78.

As one commentator has reluctantly observed, the *Carbon Black* decision, "At the very least . . . stands for the proposition that a choice of forum clause will not be enforced unless the selected state would provide a more convenient forum than the state in which suit is brought."[33] We conclude that the forum selection clause, in and of itself, did not compel the district court to stay proceedings in the limitation action so that the parties might litigate in England pursuant to its provisions.

It was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens.[34] But apart from the forum selection clause itself the circumstances supported a retention and determination by the district court.[35] Though the towage contract envisioned a long voyage with potential exposure to the jurisdiction of numerous states, the flotilla never escaped the Fifth Circuit's mare nostrum, and the casualty occurred in close proximity to the district court. A considerable number of potential witnesses, including Zapata's crewmen who were aboard the Chaparral, reside in the gulf coast area of the United States. Preparations for the voyage were made in this area, and, after the casualty, inspection of the damage and repair work was conducted there. The testimony of Bremen's crewmen, residing in Germany, is available by

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[33]Reese, *The Contractual Forum: Situation in the United States*, 13 Am.J.Com.L. 187, 191-192 (1964).

[34]Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950). *See* Canada Malting Co. v. Paterson S.S., Ltd., 285 U.S. 413 (1932).

[35]In a footnote to its brief, Unterweser states:

> At oral argument on its Motion, counsel advised the District Court that Unterweser did not intend to press its Motion for Dismissal for Lack of Jurisdiction, nor did it intend to press the *forum non conveniens* argument. It was recognized that the Court did have *in rem* jurisdiction over BREMEN, and it was further recognized that after the fact inconvenience to the parties was not controlling upon the question of enforceability of the contract clause providing for a London forum and English law. Furthermore, upon analysis, there was no strong balance of convenience favoring either the U.S. forum or the London forum, *quite apart from consideration of the Towage Contract.* (Emphasis in original).

way of depositions already taken in the proceedings. The only other nation having significant contacts with, or interest in, the controversy is Germany.[36] England's only relationship is the designation of her courts in the forum clause.

Zapata, the only claimant in the limitation action, is a United States citizen. The discretion of the district court to remand the case to a foreign forum was consequently limited.[37] This is especially true since, as the court noted, there are indications that Zapata's substantive rights will be materially affected if the dispute is litigated in an English court. The towage contract contained the following exculpatory provisions:

> 1. . . . Urag [Unterweser], their masters and crews, are not responsible for defaults and/or errors in the navigation of the tow.
>
> 2.(b) Damages suffered by the towed object [Chaparral] are in any case for account of its owners.

These provisions are apparently contrary to public policy and unenforceable in American courts.[38] However, according to the affidavit of F. D. Bateson, Zapata's English maritime law expert, these clauses would be held prima facie valid and enforceable by an English court.[39] The district court was entitled to consider that

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[36]Unterweser is a German national. The Bremen was built and is registered in Germany and her 23 crewmen are all German nationals. The towage contract was executed by Unterweser in Bremen, Germany.

[37]Swift & Co. Packers v. Compania Colombiana Del Caribe, S.A., 339 U.S. 684 (1950); Burt v. Isthmus Dev. Co., 218 F.2d 353 (5th Cir.), *cert denied*, 349 U.S. 913 (1955). Annot., 90 A.L.R.2d 1109 § 9 at 1125 (1963).

[38]Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 372 U.S. 697 (1963); Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

[39]The affidavit stated in part.

> It is my opinion that the above quoted exculpatory clauses, under English law, are not against the public policy of Eng-

remanding Zapata to a foreign forum, with no practical contact with the controversy, could raise a bar to recovery by a United States citizen which its own convenient courts would not countenance.

Moreover, it is doubtful that Unterweser would benefit even if we ignored *Carbon Black* and somehow resurrected the *Muller* rule. The minority of jurisdictions which recognize forum selection provisions, as prima facie valid, deny enforcement where the clause is shown to be unreasonable.[40] One commentator, advocating this position, elaborated on the question of reasonableness:

> [E]ffect should be denied the clause if there is reason to believe that the courts of the selected state would deal unfairly with the plaintiff or would deny him relief to which he was entitled, ...
>
> Likewise, effect should be denied the clause if the selected state is a seriously inconvenient one for the trial of the action, as might b e true in a situation where the occurrence sued upon took place in a distant place from which, if the trial were to be held in the selected state, it would be necessary to transport large numbers of witnesses.[41]

On the facts of the present case the district court did not choose to disturb the original choice of forum.[42] We do not feel it abused its discretion in this regard.

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land, and would be held to be prima facie valid and enforceable by an English Court should a cause of action be filed in England either by way or original action or by way of counterclaim. . . .

Unterweser does not take issue with Mr. Bateson's interpretation of English law.

[40]Central Contracting Co. v. Maryland Cas. Co., 367 F.2d 341 (3d Cir. 1966); General Motors Overseas Operation Div. v. S.S. Goettingen, 225 F. Supp. 902 (S.D. N.Y. 1964); Chemical Carriers, Inc. v. L.Smit & Co.'s Internationale Sleepdienst, 154 F. Supp. 886 (S.D.N.Y. 1957).

[41]Reese, *supra* note 33 at 189.

[42]Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

III

Having declined to stay the limitation action, we feel it was proper for the district court to restrain Unterweser from proceeding in any other court. The Supreme Court, regarding limitation proceedings, has stated:

> [T]his court has by its rules and decisions given the statute a very broad and equitable construction for the purpose of carrying out its purpose, and for facilitating a settlement of the whole controversy over such losses as are comprehended within it, and that all the ease with which right can be adjusted in equity is intended to be given to the proceeding.[43]

Unlike the situation faced by the district court in *Petition of A/S J. Ludwig Mowinckels,*[44] the instant case involves only two contestants, both of whom are properly before a court of competent jurisdiction. It was within the court's discretion to determine, as it did, that allowing simultaneous prosecution of the same action in a foreign forum thousands of miles away would result in "inequitable hardship" and "tend to frustrate and delay the speedy and efficient determination of the cause."[45] On the facts of the present case, we find no abuse of that discretion.

In accordance with the foregoing, the order of the district court is AFFIRMED.

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[43] Hartford Accident & Indem. Co. v. Southern P. Co., 273 U.S. 207, 215 (1927).

[44] 268 F. Supp. 682 (S.D.N.Y. 1967), see note 13 *supra*.

[45] *See* Petition of Bloomfield S.S. Co., ——— F.2d ———, (2d Cir), [Nos. 33681, 33947, 34015, Feb. 26, 1970].

WISDOM, Circuit Judge, dissenting.

"Problems arising in a court call for a perceptive awareness not only of what courts are for but of what a legislature is for and sometimes also of what an administrative agency is for *and of what matters can best be left to private decision.*" H. Hart & A. Sacks, The Legal Process iii (tent. ed. 1958) (emphasis supplied).

In this case we deal with an agreement made between two responsible corporations involved in an international transaction. This transaction was no run-of-the-mine project. The subject of the contract was the towing of a six million dollar self-elevating oil drilling barge from the Mississippi to the Adriatic. Unterweser, the tower, is a corporation organized and domiciled in Germany. Zapata, owner of the rig, is a Delaware corporation domiciled in Texas. Zapata solicited bids from several towing companies before engaging Unterweser. Zapata then requested Unterweser to furnish a written contract for its perusal. Unterweser, which generally inserts a provision for German jurisdiction and application of German law, specified an English forum and English law as a reasonable compromise with an American firm in a transaction requiring an oil rig to traverse the Gulf of Mexico, the Atlantic, the Mediterranean, and the Adriatic. After reviewing the suggested contract, Zapata made several changes in the document before executing it. Presumably Zapata could have rejected the contract outright and accepted one of the other bids. Yet the Court holds that these corporations of diverse nationalities, performing a contract in the vicinity of many jurisdictions, could not effectively agree on which forum they would use to regulate their relationship and settle their disputes (probably the best method of ensuring a correct application of the governing law. Reese, The Contractural Forum: Situation in the United States, 13 Am. J. Comp. L. 187, 189 (1964). Inevitably such a holding poses a

serious disability to certainty in the ever-growing international trade. Where contract relations permit advance planning in transnational contracts, "there are evident advantages in such certainty, in avoiding later jurisdictional disputes. Transnational commercial activities would thereby be facilitated". H. Steiner & D. Vagts, Transnational Legal Problems 727 (1968).[1]

If *Carbon Black Export, Inc. v. The SS Monrosa*, 5 Cir. 1958, 254 F.2d 297, *cert. dismissed*, 1959, 359 U.S. 180, requires the result the Court reaches here, then I believe that case is outmoded. The *Carbon Black* Court[2] believed "the universally accepted rule" to be that forum agreements are unenforceable. I cannot tell whether the majority here reads *Carbon Black* at its broadest, that forum agreements are necessarily "contrary to public policy and will not be enforced", 254 F.2d at 301, or at its narrowest, "that a choice of forum clause will not be enforced *unless the selected state would provide a more convenient forum than the*

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[1] *See* Nadelmann, The Hague Conference on Private International Law & the Validity of Forum Selecting Clauses, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum. "Prorogation, Agreements", 15 Rutgers L. Rev. 414 (1961).

[2] In *Carbon Black*, an American exporter sued both the vessel and the vessel's owner, an Italian corporation, for damage to and nondelivery of a cargo of carbon black placed on board the S.S. Monrosa in the United States for shipment to Italy. The defendant moved for dismissal because of a provision in the contract that any action for loss or damage to the goods should be brought in Genoa. This Court reversed the district court's decision to grant the motion, holding that the in rem action did not come within the language of the forum clause. With respect to the action in personam we stated that "the universally accepted rule [is] that agreements in advance of controversy . . . to oust the jurisdiction of the courts are contrary to public policy and will not be enforced". The Supreme Court at first granted certiorari to resolve an apparent conflict with Wm. H. Muller & Co. v. Swedish American Line, Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, then dismissed certiorari as improvidently granted, finding that the clause in *Carbon Black* did not include an in rem action and refusing to rule on the clause's validity with regard to the in personam action. 359 U.S. 180. *Muller* had said that courts should enforce a forum clause unless it was unreasonable or prohibited by statute.

state in which suit is brought". Reese at 192 (emphasis supplied).[3] Believing as I do that *Carbon Black's* rule

[3]Perhaps the original *Carbon Black* opinion is largely responsible for that ambiguity. After presenting its universal rule, *Carbon Black* stated that it neither espoused nor rejected the Second Circuit's position in *Muller*. *Carbon Black* referred to factual distinctions from Muller which tended to show that the operation of the *Carbon Black* forum clause was less reasonable than *Muller's*, then concluded that the doctrine of forum non conveniens did not justify declining jurisdiction because the balance was not strongly in favor of the defendant. Thus, it is unclear whether the factual distinctions buttress the conclusion that forum non conveniens did not apply, or whether *Carbon Black* was somehow retreating from the universality of its principle. I believe the same ambiguity is reflected in Insurance Company of North America v. N.V. Stoomvaart-Maatschappij "Oostzee", E.D. La. 1961, 201 F. Supp. 76. There the district court concluded that *Carbon Black* required forum clauses to "be stricken herewith as being contrary to public policy and unenforceable", 201 F. Supp. at 78, but proceeded to analyze the reasonableness of the particular clause in the circumstances presented.

There are other indications that this Court has not taken such a harsh view of forum clauses as *Carbon Black* proposes. In Anastasiadis v. S.S. Little John, 5 Cir. 1965, 346 F.2d 281, *cert. denied*, 1966, 384 U.S. 920, for example, we affirmed the district court's decision to decline jurisdiction of an in rem suit. There, a Greek Seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek courts at Piraeus as the forum. When the seaman joined the ship at Houston, he found conditions unsatisfactory and sued in a Texas district court for breach of contract and tort. Depositions of witnesses ween taken in the United States. This Court concluded that even though the district court undoubtedly had jurisdicion, it also had discretion to decline jurisdiction of a controversy between foreigners. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, the Court declined to do so. It said.

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

346 F.2d at 284. It is perhaps this less rigorous view of forum clauses and Oostzee's analysis of the unreasonable aspects of the

is erroneous both historically and analytically, however, I must reject both the broad and the narrow formulations as unsatisfactory.[4]

I think the rule should be "outright recognition of the parties' autonomy . . . if tempered by the court's continuing power to refuse effect to 'unreasonable' prorogation [choice of forum] agreements, and subject to specific legislation limiting access to the courts of the forum". A. Ehrenzweig, Conflict of Laws § 41, at 153 (1962). Or, as the Restatement puts it, "[t]he parties' agreement as to the place of the action cannot oust a state of judicial jurisdiction, but such an agreement will be given effect unless it is unfair or unreasonable". Restatement (Second) of Conflict of Laws § 80 (Proposed Off. Draft, 1967).[5]

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forum clause there that have prompted the observation by some commentators that cases striking down forum clauses in the Fifth Circuit emphasize the "unreasonable character" of the particular clause. *See, e.g.*, Steiner v. Vagts at 734.

[4]Perhaps *Carbon Black* could be distinguished or limited to its facts. The Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, applied there, and the Second Circuit has recently found that § 3(8) of that Act makes forum clauses unenforceable where it applies. Indussa Corp. v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200; *accord*, G. Gilmore & C. Black, The Law of Admiralty § 3-25, at 125 n. 23 (1957); 40 U. Col. L. Rev. 159 (1967); 8 Va. J. Int. L. 161 (1967); Note, Enforcement & Effect of the Jurisdiction Clause in Admiralty, 34 St. John's L. Rev. 72, 76-79 (1959). *But see* 9 Harv. Int. L. J. 333, 339-40 (1968); 14 Wayne L. Rev. 609, 614-16 (1968); 45 Corn. L. Q. 364, 372 (1960). *Carbon Black*, moreover, specifically stated that it neither espoused nor rejected *Muller*, a case that enforced a forum clause where there was no evidence of undue bargaining pressure and the clause was not unreasonable. Finally, *Carbon Black* dealt with the specification of an Italian forum for a contract printed in English adopting American law (COGSA) and executed in the United States. But I tend to agree with the majority that *Carbon Black's* language and reasoning, even at their narrowest, are broad enough to cover this case, and I feel that it must be overruled.

[5]The Restatement of Contracts § 558 (1932) is sometimes read the same way, *see* Krenger v. Pennsylvania R.R., 2 Cir. 1949, 174 F.2d 556, 561 (L. Hand, J., concurring), presumably because the Restatement specifies that agreements to litigate in federal rather than state court or vice versa are illegal, but outlaws other

I.

The courts' distaste for forum clauses has usually been linked to a supposed longstanding judicial antipathy to arbitration agreements. Ehrenzweig § 41, at 148. Most judges and commentators have attributed this attitude to "the contests of the different Courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction". *Scott v. Avery*, 5 H. L. Cas. 811, 853, 40 Rev. R. 392, 413 (1856) (Lord Campbell): But more recently scholars have demonstrated that the supposed antagonism to arbitration agreements was not so entrenched and that its apparent cause, the desire for fees, was erroneously ascribed. 6A A. Corbin, Contracts § 1433, at 391-95 (1962);

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agreements limiting the tribunal only if they do so "unreasonably".

The presumption quoted in text from the Restatement of Conflicts has changed since an earlier draft. In 1957 the comparable section read:

> The parties' agreement as to the place of suit cannot prevent the exercise of judicial jurisdiction by a State. A provision to this effect will, however, be given effect by a court if it is deemed fair and reasonable.

Restatement (Second) of Conflict of Laws § 117a (Tent. Draft No. 4 1957).

The Comment to the present § 80 is a useful synopsis of my position in this dissent. As the rationale for § 80, it states:

> Private individuals have no power to alter the rules of judicial jurisdiction. They may not by their contract oust a state of any jurisdiction it would otherwise possess. This does not mean that no weight should be accorded a provision in a contract that any action thereon shall be brought only in a particular state. Such a provision represents an attempt by the parties to insure that the action will be brought in a forum that is convenient for them. A court will naturally be reluctant to entertain an action if it considers itself an inappropriate forum. And the fact that the action is brought in a state other than that designated in the contract affords ground for holding that the forum is an inappropriate one and that the court in its discretion should refuse to entertain this action. Such a provision, however, will be disregarded if it is the result of overreaching or of the unfair use of unequal bargaining power or if the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action. On the other hand, the provision will be given effect, and the action dismissed, if to do so would be fair and reasonable.

Ehrenzweig § 42, at 153 & n. 26; Sayre, Development of Commercial Arbitration Law, 37 Yale L. J. 595 (1928).[6] Instead, until the Statute of Fines and Penalties, 8 & 9 Wm. III (1687), made the remedy impractical, courts consistently enforced arbitration agreements through the vehicle of penal bonds. With this remedy gone, pressure mounted to make arbitration agreements irrevocable. The courts resisted not on account of the fees involved, but because "arbitration proceedings were not regulated and the parties' only effective protection against an unfair or insufficient hearing by the arbitrators was in revoking the submission before the award was given". Sayre at 605.[7] Not until the nineteenth century was the revocability of arbitration agreements simply premised on the courts' opposition to "ouster" from their jurisdiction. Ehrenzweig § 42, at 155.[8] And then legislative action both in England and in the United States encouraged the courts to take a more benevolent view of such agreements.[9]

The strength of this misconception, however, seems to have contributed to American courts' generally negative attitude toward forum clauses. *Home Insurance*

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[6]If ever there had been any substance to the fees argument, it should have no force in our Circuit where we are faced with crowded and constantly growing dockets (especially since we are not paid by the case).

[7]*Cf.* 6A Corbin, § 1433, at 391-95. Forum clauses are sometimes referred to as preferable in this respect, because a judicial remedy is still available. Ehrenzweig, § 42, at 152.

[8]Sayre at 604 identifies an eighteenth century case, Kill v. Hollister, 1 Wils. 129 (1746) as the first case actually to speak in these terms, but the majority of cases were later.

[9]Common Law Procedure Act of 1954, 17 & 18 Vict., c. 125, § 11 (permitting use of the courts' discretion); Arbitration Act of 1889, 52 & 53 Vict. c. 49; Georgia Arbitration Act, Ga. Laws 1855-56, 222-24. Action in the United States did not become significant until after Judge Hough's sardonic opinion in United States Asphalt Ref'g Co. v. Trinidad Lake Petroleum Co., S.D.N.Y. 1915, 222 Fed. 1006. *See* Sayre at 612. But that opinion prompted enactment of arbitration statutes. *See e.g.*, Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, 707: "Settlements of disputes by arbitration are no longer deemed contrary to our public policy. Indeed, our statute encourages them."

Company v. Morse, 1874, 20 Wall. (87 U.S.) 445, 22 L.Ed. 365, 368, concluded that the authorities showed agreements in advance to oust the courts of jurisdiction conferred by law [to be] illegal and void". The Court quoted at length from *Scott v. Avery* and from Mr. Justice Story's Commentaries on Equity Jurisprudence (§ 670) that

> where the stipulation, though not against the policy of the law, yet is an effort to devest the ordinary jurisdiction of the common tribunals of justice, such as an agreement in case of dispute to refer the same to arbitration, a court of equity will not any more than a court of law interfere to enforce agreement . . . .[10]

In truth, however, courts had not uniformly disfavored forum clauses. Decisions enforcing the parties' designation of a forum date back to 1796. *Gienar v. Meyer,* 126 Eng. Rep. 728 (C.P. 1796) (Dutch seaman suing Dutch seamaster for wages in English court; *held,* ship's articles specifying the code of Rotterdam and the courts of Holland were enforceable). They continue through the nineteenth century despite the fear of "ouster". Indeed, the example of arbitration influenced the English courts to deal kindly with forum clauses. *Law v. Garrett,* 8 Ch. D. 26 (C.A. 1878), for example, spoke in terms of arbitration in a case involving the stipulation of a Russian court in St. Petersburg.

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[10]The heart of *Morse* was the constitutional issue of the line between state and federal jurisdiction. A Wisconsin statute required that before doing business in the state, all foreign corporations must sign agreements not to remove a suit from state to federal court. The Home Insurance Company filed the agreement, but when sued, attempted to remove the case to federal court. The Wisconsin courts refused to allow removal. The United States Supreme Court reversed on the ground that a state had no constitutional power to compel a surrender of the right of removal to federal court. The observation that even without the statute such an agreement was void appears to be surplusage. The more compelling argument against enforcing the clause was the fact that an unconstitutional condition was being imposed. Since the alternative was prohibition against doing business in Wisconsin, the contract could also be characterized as one of adhesion. We do not face the *Morse* constitutional argument in this case.

Lord Justice Baggallay observed that the court entirely agreed with *Willesford v. Watson,* L.R. 8 Ch. 473 (1870), that where "parties choose to determine for themselves that they will have a forum of their own selection instead of resorting to the ordinary Courts, a *prima facie* duty is cast upon the Courts to act upon such arrangement". 8 Ch. D. 26, 37. The agreement did not "oust" the court of jurisdiction, but did give it discretion to stay the proceedings. The English courts have continued to follow the principle of *Law v. Garrett.*[11] Today their rule appears to be enforcement of a forum clause unless the particular case militates against it. The Vestris, 43 Lloyd's List L.R. 86 (Adm. Div. 1932). "[A] forum selection agreement will, *prima facie,* be respected; the burden of proof lies upon the party resisting the application for a stay; and he must convince the court that a stay should be granted." Cowen & Mendes da Costa, The Contractual Forum: Situation in England & the British Commonwealth, 13 Am. J. Comp. L. 179, 186 (1964).

American courts, however, have generally retained their hostility to forum agreements. If the law is to be applied simply by tallying up the number of precedents that have not been overruled, then the majority opinion here is undoubtedly correct.[12] But important incursions have been made. In 1949, Judge Learned Hand observed:

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[11] *See, e.g.,* Austrian Lloyd Steamship Co. v. Gresham Life Ass. Soc'y [1903] 1 K.B. 249 (C.A.); Kirchner & Co. v. Gruban, [1909] 1 Ch. 413 (1908); The Media, 41 Lloyd's List L.R. 80 (Adm. Div. 1931).

For a discussion of the law on forum clauses in the British Commonwealth see Cowen and Mendes do Costa, The Contractual Forum: A Comparative Study, 43 Can. Bar Rev. 453 (1965). For other countries, *see generally* The Validity of Forum Selecting Clauses: Proceedings of the 1964 Annual Meeting of the American Foreign Law Association, 13 Am. J. Comp. L. 157 (1964); Lenhoff, The Parties' Choice of a Forum: "Prorogation Agreements", 15 Rutgers L. Rev. 414 (1961).

[12] Many of the cases are cited at Annot., 56 A.L.R.2d 300 (1957) (and Later Case Service, 1967). In 1950 it was said of the few cases that enforced a forum clause, "they stand alone, separate and apart, branded with the malodorous antipathy of a bastard child at a family reunion of bluebloods". Comment, Agreements in Advance Conferring Exclusive Jurisdiction on Foreign Courts, 10 La. L. Rev. 293, 297 (1950).

> In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all; in the words of the Restatement [of Contracts § 558], the are inavlid only when unreasonable. . . . What remains of the doctrine is apparently no more than a general hostility, which can be overcome, but which nevertheless does persist.

Krenger v. Pennsylvania Railroad, 2 Cir. 1949, 174 F.2d 556, 561 (concurring opinion). In 1951, the Second Circuit enforced a forum clause specifying Norwegian courts. *Cerro de Pasco Copper Corporation v. Knut Knutsen,* 2 Cir. 1951, 187 F.2d 990.[13] And in 1955 it went one step farther in destroying the hostility, holding in *Wm. H .Muller & Company v. Swedish American Lines, Ltd.,* 2 Cir. 1955, 224 F.2d 806, *cert. denied,* 1955, 350 U.S. 903, that courts should enforce a forum clause in an international contract unless it was unreasonable or prohibited by statute.[14] I must disagree with the ma-

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[13]Although Cerro de Pasco was a New York corporation, the district court found that it was "like an assignee" of a Belgian corporation and that the controversy was therefore really between aliens. S.D.N.Y. 1950, 94 F. Supp. 60, 61. The Second Circuit, however, did not refer to this argument. It dealt specifically with the issue whether an American court could decline jurisdiction of an American plaintiff and held that the forum clause made Swift & Co. Packers v. Compania Colombiana, 1950, 339 U.S. 684, S.Ct. , 95 L.Ed. 1206 *(see* discussion in section III, *infra),* inapposite.

[14]In *Muller* a New York corporation sued in a New York federal court to recover the value of a cargo of cocoa beans lost in transit between Sweden and Philadelphia. The district court dismissed the suit because a clause in the bill of lading provided that any claims against the vessel's owner, a Swedish corporation, should be decided according to Swedish law and in the Swedish courts. The Second Circuit affirmed, holding first that the forum clause was not contrary to COGSA because its application would not result in a "lessening" of the "liability" imposed upon the defendant by the Act; second, that a forum clause should be enforced unless unreasonable or contrary to statute. The clause in question was not unreasonable because "most of the evidence as to unseaworthiness will be more readily available in a Swedish court"; all members of the crew resided in Sweden and the vessel had been built in that country; and, "for aught that appears", the parties' consent to inclusion of the clause in the bill of lading was "freely given".

jority's conclusion that *Indussa Corporation v. S.S. Ranborg*, 2 Cir. 1967, 377 F.2d 200,[15] overrules this part of *Muller, Indussa's* decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to *Carbon Black*) and for that reason *Muller* was overruled. "[T]he *Muller* court leaned too heavily on general principles of contract law and gave insufficient effect to the enactments of Congress governing bills of lading . . . ." 377 F.2d at 202. Where COGSA does not apply as in this case, I believe Muller's "general principles of contract law" still lead to *Muller's* result.[16]

In 1965, the Pennsylvania Supreme Court enforced a forum clause between two American parties specifying New York courts. The Pennsylvania court started with the proposition that private bargaining could not change statutory rules of jurisdiction or venue.

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[15] In *Indussa* a New York corporation sued the vessel because a cargo of nails and barbed wire arrived in San Francisco, from Antwerp, Belgium, rusted and depreciated in value. The district court dismissed the suit on the basis of a clause specifying the carrier's principal place of business (Norway) as the forum.

[16] Judge Friendly's remarks about the consequences of sending an American to a foreign forum must be read in the context of his concern accurately to comply with a statute prohibiting contract terms that lessen liability. If they go beyond that, I must agree with Judge Moore's special concurrence that it is "singularly inappropriate for our courts to say, in effect, that the courts of all other nations are so unable to dispense justice that as a matter of public policy, we must protect our citizens by outlawing any other tribunal than our own". 377 F.2d at 205. That they do not I am convinced by Judge Friendly's rejoinder: "we do not 'outlaw any other tribunal than our own' as our brother Moore suggests; we hold merely that Congress outlawed clauses prohibiting American courts from deciding causes otherwise properly before them". *Id.* at 204. I observe, however, that the concern that expenses in going to a foreign court may outweigh an American's modest claim tends to ignore the other side of the coin, that a foreign national's expenses in coming to the United States may outweigh the value of asserting a legitimate defense to the modest claim. It will not do to say in these cases that part of the contract has American ties, for part of the contract has foreign ties. Properly designed forum clauses can deal with such circumstances and arrive at a fair compromise.

> However, we do not agree with these cases to the extent that they hold that an agreement between the parties, purporting to determine the forum where future disputes between them should be litigated, is *per se* invalid and without legal effect. The modern and correct rule is that, while private parties may not by contract prevent a court from asserting its jurisdiction or change the rules of venue, nevertheless, a court in which venue is proper and which has jurisdiction should decline to proceed with the cause when the parties have freely agreed that litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation.

Central Contracting Company v. C. E. Youngdahl & Company, 1965, 418 Pa. 122, 209 A.2d 810, 816.

The Third Circuit, confronted with the same forum clause the next year, concluded that

> both federal and state courts have increasingly in recent years recognized the same principle which the Supreme Court of Pennsylvania has now adopted. It is becoming more widely recognized that for reasons of business or convenience the parties may have bargained that all litigation arising out of their complex activity under a contract shall be drawn into one jurisdiction. So long as there is nothing unreasonable in such a provision there is no basis for viewing it as an affront to the judicial power, which must be stricken down. On the contrary, it should be respected as the responsible expression of the intention of the parties so long as there is no proof that its provisions will put one of the parties to an unreasonable disadvantage and thereby subvert the interests of justice.

Central Contracting Company v. Maryland Casualty Company, 3 Cir. 1966, 367 F.2d 341, 344-45.[17]

[17]The Supreme Court may have expressed approval of forum clauses in an interstate context in National Equipment Rental v. Szukhent. 1964, 375 U.S. 311, 315-16, 84 S.Ct. 411, 11 L.Ed. 2d

This very cursory review indicates that an unqualified judicial opposition to forum and arbitration clauses has at best only weak historical antecedents. Neither arbitration nor forum clauses were the subject of such opprobrium as has popularly been supposed. Concern there was, but not a universal rule that such clauses were void. And despite American courts' general disregard of forum clauses, significant dissenting views have been registered.[18]

II.

A search for policies to buttress the wholesale invalidation of forum clauses is likewise unsuccessful. Chief Justice Shaw of Massachusetts tried to formulate

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354, 357-58. In dealing with a contract clause designating an agent for service of process, the Court said:

> The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York. . . . And it is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court. . . .

Szukhent is not significant authority, however, because the Court there was faced with the question whether New York courts had jurisdiction, not whether other courts should decline jurisdiction. Justice Black, dissenting, reads *Szukhent* more broadly: "Here this contract as effectively ousts the Michigan courts of jurisdiction as if it had said so. Today's holding disregards Michigan's interest in supervising the protection of rights of its citizens who never leave the State but are sued by foreign companies with which they have done business". 375 U.S. at 327, 11 L.Ed. 2d at 364-65.

[18] Earlier cases foreshadowed these results. Gilbert v. Burnstine, 1931, 255 N.Y. 348, 174 N.E. 706, hold that a New York citizen's agreement to arbitrate in England should be enforced. The New York court concluded that these agreements were not contrary to public policy, and "[c]ontracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. 174 N.E. at 707. Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, enforced a forum clause designating Italian courts. Although the plaintiffs were New York citizens, the contract conferred Italian domicile upon them. Therefore, the court spoke of the contract as "between citizens of foreign states" and found no public policy to prevent enforcing it. For a collection of recent cases enforcing forum clauses see Annot., *supra* note 12.

the arguments in 1856, recognizing then that history afforded "no authority upon which to determine the case". *Nute v. Hamilton Mutual Insurance Company*, 72 Mass. (6 Gray) 174, 185 (1856). He reasoned first that

> [t]he rules to determine in what courts and counties actions may be brought are fixed, upon considerations of general convenience and expediency, by general law; to allow them to be changed by the agreement of parties would disturb the symmetry of the law, and interfere with such convenience.

Id. at 184. This symmetry and convenience argument bears doubtful relevance to the intrastate venue problems involved in Nute.[19] On the international scene, it is simply inapplicable. Reese at 188. No general law fixes venue among the nations and states, only individual jurisdictional rules and happenstance. Convenience and expedience can more successfully be served by duly considered forum agreements fairly bargained for and enforceable.

> Shaw's second concern was that forum contracts might be induced by considerations tending to bring the administration of justice into disrepute; such as the greater or less intelligence and impartiality of judges, the greater or less integrity and capacity of juries, the influence, more or less, arising from personal, social or political standing of parties in one or another county.

Id. at 184. To the extent this argument is a real concern, it appears less pertinent to an international context than to intrastate venue problems where parties might more easily exert influence on local adjudicators. If it is a problem, however, wholesale prohibition of forum clauses is an excessive response. An inquiry that takes

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[19]See Daley v. People's Bldg., Loan & Sav. Ass'n., 1901, 178 Mass. 13, 59 N.E. 452 (Holmes, C.J.: *Nute* obviously was "a somewhat hesitating decision", not to be extended; *held*, contractual stipulation of New York forum was enforceable).

this factor into account where it arises would adequately meet that concern. The best comment about Shaw's policy arguments is his own: "these considerations are not of much weight" and "no great reliance" deserves to be placed upon them. *Id.* at 184.

The greatest inconvenience to the Massachusetts Chief Justice's mind was

> requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulation of parties in framing and diversifying their contracts in regard to remedies.

Id. Of course consistent enforcement of a forum stipulation need not produce confusion. Shaw's real objection was rooted in his belief that the parties to a contract could not make terms with regard to their remedy; that was a matter only the courts could decide. *Id.* at 180-81. Although the distinction between sustantive rights and remedies may well exist, the breadth of the principle as Shaw saw it has been subjected to serious challenge, Ehrenzweig § 41, at 149,[20] and in the case of arbitration statutes, overruled.

> [G]enerally, all stipulations made by parties for the government of their conduct, or the control of their rights, in the trial of a cause, or the conduct of a litigation, are enforced by the courts.
>
> . . . [I]t is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the courts. They do not literally control the power of the courts except as such power is in all cases circumscribed by the necessity which obliges every court to apply the proper rules of law to the facts of every case, and to exercise its powers according to established principles.

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[20] *See* 6A Corbin § 1432, at 386 n. 76 & § 1434, at 397.

In re New York, Lackawanna & Western Railroad Company, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 522, 523-24. It may be that some questions of remedy are less amenable to private settlement than are questions of primary rights and obligations. But the specific question still unanswered is whether forum clauses are thus an inappropriate subject for private ordering.

This Court was no more successful in marshalling arguments to support its conclusion in *Carbon Black*. We simply relied on authority as characterized by Corpus Juris Secundum and American Jurisprudence to opine that forum agreements are "contrary to public policy". That of course "is the conclusion to be proved rather than proof for the conclusion". Ehrenzweig, § 41, at 149. Our apparent concern that such agreements attempted to "oust" us of jurisdiction was ill-considered. The majority here correctly points out that jurisdiction is not an issue. The question is whether a court possessing jurisdiction should for good and sufficient reasons decline to exercise it. But since the bogey of jurisdictional ouster infuses so much of the opposition to forum clauses and since it infuses the *Carbon Black* rule to which the Court pays obeisance today, it is necessary to lay it to rest. There are various ways to do so. For example, "[i]f the agreement is enforced, it cannot truly be said that jurisdiction has been conferred or ousted by the parties. Jurisdiction is exercised or withheld only by force of the law that gives effect to the parties' agreement", Perillo, Selection Forum Agreements in Western Europe, 13 Am. J. Comp. L. 162 (1964); *accord, In re New York, Lackawanna & Western Railroad Company*, 1885, 98 N.Y. 449, 453, 62 N.Y.S. 533, 534. If that formulation does not persuade the fearful we can follow the example of the Netherlands. There "the courts recognize that the parties have no power to modify the rules of jurisdiction. Nevertheless, the courts refuse to participate in a breach of contract. Consequently, they refuse to take cognizance of a case in violation of the parties' agreement." Perillo at 165; *accord, Racehorse Betting Control Board v. Secretary for Air*, [1944] 1 Ch. 114, 126 (C.A. 1943).

In summarizing the English view, Lord Denning couches it in these terms:

> I do say that the English courts are in charge of their own proceedings: and one of the rules they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. It is a matter to which they will normally give effect, but it is subject to the overriding principle that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.

The Fehmarn, [1958] 1 Weekly L.R. 159, 161-62 (C.A. 1957). Finally a federal judge has concluded:

> With th[e] proposition [that the parties cannot oust a court of jurisdiction] there can be no quarrel. However, the very fact that it is so well established tends to reduce its value, since parties to an exclusive forum arrangement are unlikely to intend a purpose which they must realize cannot be achieved. Therefore, in drafting their agreement they would normally mean not to deprive some courts of jurisdiction but to express their desire that these courts relinquish jurisdiction in deference to what was at least originally the belief that suits could be better or more conveniently tried someplace else.

Geiger v. Keilani, E.D. Mich. 1967, 270 F. Supp. 761, 765 (Freeman, C.J.).[21]

I cannot believe that jurisdictional ouster is a real issue. We are willing to dismiss a suit of which we have jurisdiction if it is between aliens.[22] And federal courts have not been chary of "losing jurisdiction" in other areas. In habeas corpus cases from state courts, federal

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[21] Compare Judge Frank's statement in *Knut Knutsen*: "It might be said that the court took jurisdiction and granted specific performance . . . ." 187 F.2d at 991 n. 1.

[22] *See Anastasiadis, supra* note 3; Burt v. Isthmus Dev't Co., 5 Cir. 1955, 218 F.2d 353, 356, *cert. denied*, 1955, 349 U.S. 922.

courts decline to exercise jurisdiction until a prisoner has exhausted state remedies. The exhaustion doctrine, now codified, 28 U.S.C. § 2254(b), was characterized not as a jurisdictional bar, but as an argument of comity — to decline, in favor of state courts, jurisdiction that we possessed. *Fay v. Noia,* 1963, 372 U.S. 391, 418, 83 S.Ct. 822, 9 L.Ed.2d 837, 856-57. The abstention doctrine is similar. "Abstention allows a federal court whose *jurisdiction has been properly invoked* to postpone decision, pending trial in a state court, when the result might turn on issues of state law." Note, Federal - Question Abstention: Justice Frankfurter's Doctrine in an Activist Era, 80 Harv. L. Rev. 604 (1967) (emphasis supplied).[23] The doctrine of forum non conveniens has also allowed a court with jurisdiction of a suit to refuse to hear the controversy where a more convenient forum is available. *Gulf Oil Corporation v. Gilbert,* 1947, 330 U.S. 501, S.Ct. , 91 L.Ed. 1055. If in all these cases we can recognize that other policies militate against the formal notion that once we have jurisdiction we must exercise it, surely we can undertake the task which *Carbon Black* neglected, of weighing the arguments against forum clauses. It is time to lose our fixation with the ancient notion of physical power — that because a tort occurs within this Court's "mare nostrum" we would be derelict not to decide the case.[24]

III.

What does emerge from the history, the cases, and the commentary is a legitimate concern for the bargaining conditions in which the forum agreement was

[23] *See* Reetz v. Bozanich, 1970, U.S. , 90 S.Ct. 25 L.Ed.2d 68.

[24] Other attempts to justify the broad rule against forum clauses have been no more successful. Attempts to distinguish arbitration by observing that arbitration "was not a limitation on the forum, but rather was an agreement to eliminate the need for any forum whatever", Bergman, Contractual Restrictions on the Forum, 48 Calif. L. Rec. 438, 439 (1960), are simply not convincing. The argument that a party's choice of forum is a substantial right not to be bartered away, *id.* at 328-29; *Morse, supra,* 22 L.Ed. at 368, is conclusory like the *Carbon Black* statement that forum clauses are against public policy. Neither position gives reasons why it should be accepted.

made and the quality of the remedy available to the parties if the agreement is enforced. These two concerns encompass several relevant factors that have been isolated. (1) Did the parties freely and intelligently enter their agreement? In contracts of adhesion, where one party possessed overweening bargaining power or where there was no opportunity to negotiate the terms, and of course where fraud has occurred, courts are unwilling to deny a plaintiff his forum on the basis of the contractual stipulation.[25] (2) Would the stipulated forum in rendering its decision transgress an important public policy of the present forum? In cases of bankruptcy, divorce, successions, real rights, and regulation of public authorities, for example, courts cannot remit the dispute to a foreign forum lest a foreign court render a decree conflicting with our ordering of these affairs.[26] And in cases where objectionable activity within our jurisdiction would be encouraged by the foreign court's decree, we would reach a similar result. *Cf.* The Kensington, 1902, 183 U.S. 263, S.Ct. , 46 L.Ed. 190. (3) Will the designated forum adjudicate the parties' dispute? A court may postpone declining jurisdiction until it is sure the foreign court will hear the dispute and provide a remedy. *See, e.g., Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, 697-98, S.Ct. , 94 L.Ed. 1206, 1215. (4) Is the designated forum seriously inconvenient for the trial of the action? Since we recognize in the doctrine of forum non conveniens that a jurisdictionally selected forum should sometimes give way to another in the face of strong arguments of convenience, it would be anomalous to ignore those considerations where the parties have selected a forum without the benefit of hindsight.

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[25] This may be a better rationale for cases that refuse to enforce forum clauses in passenger and baggage tickets, *See, e.g.,* Muoio v. Italian Line, E.D.Pa.1964, 228 F. Supp. 290; Note, Validity of Contractual Stipulation Giving Exclusive Jurisdiction to the Courts of One State, 45 Yale L. J. 1150 (1936).

[26] *See* Article 3, Draft of a Convention on the General Jurisdiction of Contractual Forums Adopted by the Ad Hoc Committee, December 20, 1963, The Hague Conference on Private International Law, 13 Am. J. Comp. L. 160 (1964).

This list is not exhaustive but is exemplary of relevant considerations. But since these concerns can be isolated and since forum clauses can provide such a clear benefit of certainty in international trade, we should be satisfied to apply these concerns to individual cases rather than reject all forum agreements. The burden of proof should be on the party objecting to the designated forum to support his objections. *Maryland Casualty*, 367 F.2d at 345; *Youngdahl*, 209 A.2d at 816. The fourth factor in particular must not become just another label for the doctrine of forum non conveniens. It is essential to remember that the parties expressed in their agreement the judgment that on balance a particular forum was most convenient for trial of their disputes.[27] The burden should rest upon the party objecting to that forum to show a significant balance of greater inconvenience in litigating in the designated forum.

The majority has intimated that the forum clause at issue here would fail to qualify even under this more 'charitable approach, and holds that the factors in this case justify the district court's discretionary refusal to disturb the plaintiff's choice of forum. If the test I advocate is the correct one, however, there was no proper exercise of discretion by the district court. That court's memorandum order demonstrates that it invalidated the forum clause under *Carbon Black* and then, ignoring the forum clause, declined to dismiss on a forum non conveniens theory.[28] The district court's conclusion, apart from the authority of Carbon Black, was that "[t]he balance of conveniences here is not

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[27] *Youngdahl*, *supra* note 45, at 816: "Mere inconvenience or additional expense is not the test of unreasonableness since it may be assumed that the plaintiff received under the contract consideraion for these things."

[28] The district court cited *Muller*, but its analysis clearly placed the burden on the defendant to justify the transfer, as is proper under a forum non conveniens approach. The court relied on Mobile Tankers Co. v. Mene Grande Oil Co., 3 Cir. 1966, 363 F.2d 611, *cert. denied* 1966, 385 U.S. 945, for its criteria, that "[u]nless the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.' "

strongly in favor of Defendant and Plaintiff's choice of Forum should not be disturbed". A proper approach to a forum clause should reverse that burden. It is a truism that we do not observe an exercise of discretion that was misled by an erroneous view of the law. And to dispel any notion that this forum clause was unreasonable as a matter of law, I canvass the factors I have suggested.

(1) Zapata has neither presented evidence of nor alleged fraud or undue bargaining power in the agreement. Unterweser was only one of several companies bidding on the project. No evidence contradicts its Managing Director's affidavit that it specified English courts "in an effort to meet Zapata Off-Shore Company half way." Zapata's Vice President has declared by affidavit that no specific negotiations concerning the forum clause took place. But this was not simply a form contract with boilerplate language that Zapata had no power to alter. The towing of an oil rig across the Atlantic was a new business. Zapata did make alterations to the contract submitted by Unterweser. The forum clause could hardly be ignored. It is the final sentence of the agreement, immediately preceding the date and the parties' signatures. Perhaps more evidence could be accumulated, but under this evidence Zapata has not met the burden of showing that it was pressured into the forum stipulation.

(2) I conclude that the English courts would provide an adequate remedy and would contravene no important American public policy. In dealing with forum non conveniens, the majority intimates that the district court's discretion to decline jurisdiction was limited because Zapata is an American citizen and the English courts would violate our public policy. The towage contract provided:

1. * * *

> Urag [Unterweser], their masters and crews are not responsible for defaults and/or errors in the navigation of the tow.

2. * * * *

b) Damages suffered by the towed object are in any case for account of its Owners.

On the premise that the English courts would apply English law rather than American in this situation and upon the affidavit of Zapata's English law expert that English courts will enforce the contract, the majority concludes that our policy against enforcing exculpatory clauses might be violated if the controversy proceeded to England.

Of course if Zapata had chosen to abide by the contractual stipulation of forum the case would have proceeded in England and we would have had no opportunity to enforce this public policy. But beyond that, we should be careful not to over-emphasize the strength of the policy. According to *Bisso v. Inland Waterways Corporation*, 1955, 349 U.S. 85, 91, 75 S.Ct. 629, 99 L.Ed. 911, 918,[29] two concerns underlie the rejection of exculpatory agreements: that they may be produced by overweening bargaining power; and that they do not sufficiently discourage negligence. *Bisso* applied these concerns to towage contracts in admiralty jurisdiction. Yet when we sit in diversity we will enforce an exculpatory clause in favor of a railroad. *Seaboard Coast Line Railroad Company v. Tennessee Corporation*, 5 Cir. 1970, 421 F.2d 970. Neither there nor in the case of insurance contracts do the dangers strike us as so serious that federal courts cannot enforce the state law. The question here is whether the fact that a towage contract is involved and the fact that we are sitting in admiralty require us to outlaw a forum that might enforce exculpatory clauses. I believe the policy is not so strong. *Bisso*

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[29] Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78, reversed per curiam our enforcement of a towage clause assigning all liability to a barge owner solely on the authority of two earlier companion cases, *Bisso*, and Boston Metals Co. v. S/S "Winding Gulf", 1955, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933. Since *Winding Gulf* was also decided on the authority of *Bisso*, *Bisso* appears to be the determining authority.

depends less on the questions of public policy involved than on the long line of authority which it believed established a federal rule barring enforcement of such contracts.[30] Although the question has been settled by the Supreme Court for federal courts, we would unduly extend its scope in refusing to enforce a forum clause simply because a foreign forum may enforce an exculpatory clause. Here the conduct in question is that of a foreign party occurring in international waters outside our jurisdiction. The evidence disputes any notion of overreaching in the contractual agreement. And for all we know the uncertainties and dangers in the new field of transoceanic towage of oil rigs were so great that the tower was unwilling to take financial responsibility for the risks, and the parties thus allocated responsibility for the voyage to the tow.[31] It is equally

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[30] *Bisso* was only a four-Justice opinion. The fifth, Justice Douglas, concurred only because he professed ignorance of the "economics and organization of this business". He admitted that the Court's rule might be "outmoded" and in need of change, that the tugboat industry might be "less able to carry the risks of . . . losses than its customers, and that it might be "fairer in the long run" to allow the tugboat operator transfer liability. But in the absence of a record that threw light on those "large questions of policy", he was unwilling to change what he considered an already established rule in the federal courts. Justice Frankfurter, joined by Justices Reed and Burton, wrote a telling dissent seriously questioning the Court's use of its authorities and reaching the conclusion that the courts should not intervene to upset the arrangements of private parties where there was no evidence of inequality of bargaining power or of concentrated ownership or of unavailability of services by other tugs who would not require exculpatory clauses. In Frankfurter's words, the argument that irresponsibility would be stimulated "has little force, unless we are prepared also to forbid the tug to insure against such losses or liabilities". 349 U.S. at 119, 99 L.Ed. at 932.

[31] Compare our argument in Seaboard Coast Line R.R. v. Tennessee Corp., 5 Cir. 1970, 421 F.2d 970, 974: An exculpatory clause "merely means that if such an injury occurs the parties need not undertake to go to battle to determine whose negligent act, if in fact there was negligence at all, produced the injury . . . . In effect, it seems to us, that in light of the relation of the parties here, the railroad company was simply not willing to permit conjunctive use of railroad equipment by an industrial concern which may well be presumed not to have the same skill in operation of railroad equipment as the railroad company itself without requiring of the industry that it assume absolute liability with respect to any injuries resulting therefrom".

possible that the contract price took this factor into account. I conclude that we should not invalidate the forum selection clause here unless we are firmly convinced that we would thereby significantly encourage negligent conduct within the boundaries of the United States.[32] At the very least, before excluding the forum clause, we should remand to the district court for compilation of a record dealing with the economic relationships in this industry and the consequences of enforcing forum clauses in this international context.

Zapata's American citizenship may very well be an argument in some cases for refusing to decline jurisdiction on the basis of forum non conveniens.[33] *Swift & Company Packers v. Compania Colombiana,* 1950, 339 U.S. 684, S.Ct. , 94 L.Ed. 1206, decided on forum non conveniens principles (no forum clause was mentioned) that it would not deny an American citizen his American forum primarily because there was no assurance that the defendant would appear with adequate security in the foreign court. Here, of course, Unterweser and Zapata have already joined argument in the English courts, the English courts have ruled that they have jurisdiction, and Unterweser has offered to post the same security that is available to Zapata here. The

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[32]It is true that The Kensington, 1902, 183 U.S. 263, 46 L.Ed. 190, holds that federal courts are not to enforce a foreign law against our public policy where part of a contract is executed in the United States. But in *The Kensington* the defendant was a New Jersey corporation and thus a logical object of regulation by American courts. Here we deal with a foreign national operating at the time of the mishap outside our jurisdiction. In this context, I believe it is not a semantic argument to contend that enforcement of a forum clause is sufficiently attenuated from enforcement of substantive law contrary to our public policy that we do not run afoul of *The Kensington.*

Lest it be thought I thus throw open a route for United States towage contracts to escape the rule of *Dixilyn,* I observe that where both parties are American, and the tow is performed here, it is difficult to see how the towee could fail to prove a foreign forum clause unreasonable. Whether a foreign tower who suffered a mishap while operating within our jurisdiction could take advantage of a forum clause remitting him to a more favorable forum I need not now decide.

[33]*See* Annot., 48 A.L.R. 2d 800 (1956) (and Later Case Service).

Supreme Court in Swift, moreover, expressly declined to decide the "abstract question whether United States admiralty courts may decline jurisdiction over libels brought by United States citizens". 339 U.S. at 697, 94 L.Ed. at 1215. In this case we deal with a situation where Zapata voluntarily and specifically surrendered in the contract its right to proceed in American courts. *See Cerro de Pasco Copper Corp. v. Knut Knutsen*, 2 Cir. 1951, 187 F.2d 990, 991 (*Swift* "inapposite" in context of a forum clause). A proper solicitation for the interests of American citizens may militate in favor of enforcing these clauses. Otherwise, Americans who wish to contract with foreign nationals and who are willing to accept a forum clause will have difficulty in convincing the foreign party that he can rely on the agreement.[34]

(3) The availability of the English forum is certain. Soon after Zapata brought its action in the district court, Unterweser moved that court to decline jurisdiction and initiated proceedings for breach of contract and moneys due in the High Court of Justice, London, England, as the forum provision directs. Zapata appeared in the London court and moved to dismiss the summons on three grounds: that the English court was not a convenient forum; that proceedings between the parties were underway in the United States; and that

[34] Burt v. Isthmus Dev. Co., 5 Cir. 1955, 218 F.2d 353, *cert. denied*, 1955, 349 U.S. 913, cited by the majority at fn. 37, can be distinguished on several grounds. First, although the factual statement mentions that under the contract the parties submitted to Mexican jurisdiction and waived the jurisdiction of other courts, that element played no part in the decision because the Court found that the basic issue of dispute was whether "negotiations ever matured into a contract". *Id.* at 358. Second, *Burt*, a diversity case, specifically recognized that "[i]n admiralty, courts have often refused to entertain actions . . . between citizens and aliens where foreign law would govern the issue, and have relegated the litigants to the foreign court". *Id.* at 356. Finally, *Burt* followed *Swift's* example and expressly declined to hold that an American citizen's suit could not be dismissed even in nonadmiralty cases. If *Burt* requires "positive evidence of unusually extreme circumstances" and a conviction "that material injustice is manifest", *Id.* at 357, before enforcing a forum clause, it is subject to the same criticisms as *Carbon Black*.

the writ had been improperly served. The High Court of Justice ruled that it had jurisdiction, that the summons had been properly served, and that the action should proceed. Zapata appealed. The English Court of Appeal affirmed, holding that the forum provision was reasonable and that Zapata had made no showing which would compel the Court to refuse to enforce the agreement.[35] Thus, the English courts have ruled that they

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[35]Lord Justice Willmer said:

* * *

> The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. *Prima facie* it is the policy of the court to hold parties to the bargain into which they have entered. *Prima facie* it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of *THE FEHMARN*, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.
>
> I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.
>
> * * *
>
> I am unable to see that the judge acted on any wrong principle. . . . nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

Lord Justice Diplock added:

* * *

> I say again in this case, as I said in *Mackender:* "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same

will hear the controversy. Furthermore, when Unterweser advised the district court that it had initiated the action in England, it offered to keep available all the security given in the initial action — $3,500,000 — to satisfy any relief Zapata might obtain in London.

(4) The majority concludes that factors of convenience do not justify dismissing the action. But the majority treats the question under the doctrine of forum non conviens the standard for which is that the plaintiffs choice of forum "should rarely be disturbed" unless "the balance is strongly in favor" of the defendant. *Gulf Oil Corporation v. Gilbert*, 1947, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055. I submit that when a forum clause is involved our standard should be not to disturb the *contractual* choice of forum unless "the forum chosen by the parties would be a seriously inconvenient one for the trial of the particular action". Restatement (Second) of Conflict of Laws § 80; Comment, *supra* note 5. From this perspective I conclude that factors of convenience do not justify refusing the motion to decline jurisdiction.

The majority considers the following factors relevant: the casualty occurred close to the Fifth Circuit and the district court; a "considerable number" of witnesses live on the Gulf Coast; preparations for the voyage, inspection of the damage and repair work were performed here; depositions of the Bremen's crewmen are available; and there are no contacts with the English forum. Thus, they agree with the district court, which

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principle whether the forum of contractual choice is England or of some other country.

Lord Justice Widgery concluded:

> . . . The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

concluded that a "great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here". But this observation appears to ignore the fact that most of Unterweser's witnesses reside in Germany —the twenty-three crew members of the Bremen, Von Aswegen, Managing Director of Unterweser, personnel from the builders of the Bremen and the independent contractors who outfitted the vessel, individuals with companies for whom Bremen has previously towed. It is true that depositions of the German crew members are available because Zapata obtained them immediately after filing its libel. But if, as is likely, Zapata's witnesses are its crewmen (on the Chaparral) and Unterweser's witnesses are its crewmen (on the Bremen), the inference from that observation is that Zapata should have live witnesses at trial while Unterweser relies on depositions. Presumably depositions of the American witnesses could be taken for an English trial, or both sides could face the same difficulty of transporting their witnesses. Although the voyage began here and the casualty occurred nearby, the tug was built in Germany and had its home port in Bremen. As the High Court of Justice observed, "There is probably a balance of numbers in favor of the Americans, but not, as I am inclined to think, a very heavy balance". The fact that no contacts exist with the English forum is not determinative. That forum was chosen as a logical compromise should a dispute arise.[36] The English court

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[36] *Cf.* Mittenthal v. Mascagni, 1903, 183 Mass. 19, 66 N.E. 425, 426-27:

> We can fancy the parties to this contract at the time of making it saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in getting to America and returning, but will involve journeying long distances through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the state, may be arrested and held to bail or in imprisonment, if suits may be brought in any one of these numerous jurisdictions there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent

has the advantage of dividing the inconveniences between the disputants. An English-speaking court with common law traditions is probably more amenable to American plaintiffs than the German courts with which there are "contacts". Finally, the English court may very well have been chosen for the law it would apply. That factor may have enabled Zapata to obtain the low bid from Unterweser. I conclude, therefore, that Zapata has not justified disturbing the contractual choice of forum.

* * * *

For all these reasons, I believe we should overrule *Carbon Black* and remand this case to give the district court an opportunity to find the relevant facts and exercise its discretion in light of the "modern and correct rule".[37] If the district court should properly have declined to exercise its jurisdiction, then of course it should not have enjoined the London action. Given the majority's conclusion that the district court properly retained jurisdiction, however, I do not disagree with its analysis that the injunction was then proper.

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home, in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were non compotes mentis, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand?

Of course if Zapata is correct, that the contract relieves Unterweser from liability for negligence and the English courts will enforce it, then there will be no inconvenience at all, for Zapata will not try to prove negligence.

[37] Unterweser filed a limitation action one week before the time for filing lapsed because the district court had not yet ruled on its motion to dismiss. I do not believe it is thereby estopped from pressing its motion to dismiss.

APPENDIX B

OPINION

ON PETITION FOR REHEARING EN BANC

B-2

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GMBH

ZAPATA OFF-SHORE COMPANY,

Plaintiff-Appellee,

versus

M/S BREMEN and UNTERWESER REEDEREI, GMBH,

Defendants-Appellants

Appeal from the United States District Court
for the Middle District of Florida

(June 28, 1971)

ON PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

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*Judge Bell did not participate in the consideration or decision of this case.

PER CURIAM: Upon consideration of this cause en banc the Court adopts the majority opinion and judgment of the panel, 428 F.2d 888 (5th Cir. 1970).

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:

Again I feel impelled to dissent in this case. It is incredible that a court should fail to honor an agreement between a foreign corporation and a domestic corporation to settle their contractual disputes in a neutral forum according to the law of a neutral country long used to its courts' settling admiralty disputes.

The issue as stated in the majority opinion is as follows:

> The question we must decide is whether the district court was *obliged* to decline to exercise admitted jurisdiction under the facts of the admitted case. ____ F.2d ____ (Emphasis added).

In support of its position, the Court quoted the following statement from *Carbon Black Export Inc. v. The S.S. Monrosa*, 5 Cir. 1958, 254 F.2d 297, 300, *cert. dismissed*, 1959, 359 U.S. 180, *rehearing denied* 359 U.S. 999:

> In essence, the motion [to decline jurisdiction] was based upon Clause 27 as buttressed by the doctrine of forum non conveniens. Any consideration of such a question starts with the universally accepted rule that agreements in advance of controversy whose object is to *oust the jurisdiction* of the courts are contrary to public policy and will not be enforced. (Emphasis added).

The issue here is not whether the Court is "obliged" to decline to exercise jurisdiction. It is not whether parties can "oust the jurisdiction of the courts". In this case and similar cases the parties assume that the local court has jurisdiction but agree that in the absence

of unreasonable circumstances the court should exercise its jurisdiction only to the extent of giving effect to the choice of forum clause just as courts give effect to any clause expressing the intention of the contracting parties. The issue is whether in the circumstances of this case it is unreasonable for the court to enforce the bargain struck on an international transaction by two companies of diverse nationalities well able to take care of themselves in negotiating a contract.

The contract was not between some indigent American seaman and Greek shipowner to try disputes in Piraeus, Greece.[1] It was not a towing contract in inland American waterways with the towage company having superior bargaining leverage.[2] The contract in

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[1]It has been noted that, "If Zapata postulates that forum clauses are against public policy, the Fifth Circuit's opinion in Anastasiadis v. S.S. Ltle John, 5 Cir. 1965, 346 F.2d 281, becomes very difficult to explain. Comment, 8 Houston L. Rev. 739, 743 (1971). In *Anastasiadis* a Greek seaman had contracted in Greece for employment on a vessel of Liberian registry. Although a Liberian corporation owned the vessel, that corporation was in turn wholly owned and controlled by an American corporation, in turn wholly owned and controlled by a United States citizen. The contract, written in Greek, provided that the seaman would join the vessel at Houston, Texas. But it stated that Greek law would govern disputes and designated the Greek courts at Piraeus as the forum. Although a nominal foreign registry is often pierced where American laws are to be enforced against a ship beneficially owned by Americans, this Court declined to do so. We said:

> The contract in the instant case provided not only that Greek law would be determinative but also that the Greek courts were to be the proper forum for the litigation of claims arising out of the contract. We see no reason, in the circumstances of this case, why this provision should not be given effect in the absence of any suggestion in the record that Greece is an inconvenient forum or that Greek law provides an inadequate remedy.

[2]*See* Bisso v. Inland Waterways Corporation, 1955, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911; Dixilyn Drilling Corporation v. Crescent Towing and Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78. In *Dixilyn* both parties were American and the tow was to be performed here. *Bisso* emphasized that the exculpatory clause was produced by overweening bargaining power.

this case required the towage company to tow a six million dollar drilling rig from Venice, Louisiana, near the mouth of the Mississippi, through the Gulf of Mexico, across the Mediterranean, and up the Adriatic to Ravenna, Italy. Zapata, owner of the rig, solicited bids from several towing companies. The low bidder, Unterweser, a German company, generally inserts in its contract a provision for trial of disputes in German courts according to German law. The choice of forum provision was an essential element in the final contract, undoubtedly because of the validity of exculpatory clauses in English law and the possibility of the invalidity of exculpatory clauses in towage contracts in American law.[3]

The Court makes a half-hearted attempt to argue that it "was within the sound discretion of the district court to decline jurisdiction on the basis of forum non conveniens". This doctrine puts the burden on the party asserting it to justify its application. The forum non conveniens theory should have no bearing on this case — at least in terms of the burden of proof. Here the parties have agreed on the forum and the applicable law. In these circumstances Zapata, represented by experienced counsel, should not be allowed to welch on its bargain.

The contention that Unterweser should be treated as having assented to the jurisdiction of the local court by filing the limitation action is a red herring. In the first place, Unterweser (more accurately, the tug Bremen left international waters to enter the district court's jurisdiction *upon the instructions of Zapata*. Conveniently, Zapata had a United States marshal waiting to arrest the Bremen when the tug entered Tampa Bay with the disabled Chaparral (the drilling rig). And when Unterweser proceeded to move the district court to dismiss the suit, the district court failed to rule on its motion *until after the statutory period for filing a*

[3] In Seaboard Coast Line Railroad Company v. Tennessee Corporation, 5 Cir., 1970, 421 F.2d 970, this Court enforced an exculpatory clause against a railroad.

limitation action had elapsed. Unterweser had already sued in London for breach of contract. Prior to the limitation action, the High Court of Justice had ruled that Zapata had been properly served and that the action should proceed in the English courts.[4] Thus, the limitation action, filed one week before the expiration of the applicable statute of limitations, was a protective measure. When Zapata moved the district court to restrain further litigation in England, Unterweser moved to stay its own limitation proceeding until the English suit was determined. The majority admits that Unterweser invoked American jurisdiction only reluctantly. The district court may have had the *power* to order Unterweser to cease its English litigation. But *see* 39 U. Cin. L. Rev. 819 (1970).[5] The question remains, how-

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[4]Zapata appealed the ruling. After Unterweser had filed its limitation action in Tampa, the English Court of Appeal affirmed the High Court of Justice, holding that the forum clause was reasonable, and that Zapata had made no showing to justify the court's refusing to enforce the written agreement.

[5]"Unterweser had moved for the district court to dismiss for lack of jurisdiction, but the court did not rule on the motion. As time passed and the deadline for filing a limitation action in the district court approached, the court still had not ruled on the motions to dismiss. Unterweser was forced to choose one of two alternatives. It could either do nothing and hope that the court would eventually dismiss for lack of jurisdiction, or it could file a limitation action to reduce its liability to the statutory amount—the value of the vessel plus freight revenue due. Unterweser chose the latter alternative and the court held that filing a limitation action mooted the question of jurisdiction. The court of appeals affirmed that holding.

This holding perverts the purpose of a limitation action which is intended to be a defense against multiple claims or a claim in excess of the shipowner's statutory liability and not a device whereby a court can obtain in personam jurisdiction.

. . . Thus, in effect, the court forced Unterweser to file the limitation action and then found the filing of the action cured the question of lack of jurisdiction by holding that the filing mooted the question." Note, 39 U. Cinn. L. Rev. 819 (1970).

In 1949 Judge Learned Hand, in his concurring opinion in Krenger v. Pennsylvania Railroad Co., 2 Cir. 1949, 174 F.2d 556, *cert. denied*, 338 U.S. 886, stated:

[C]ourts have long looked with strong disfavor upon contracts by which a party surrenders resort to any forum which was

ever, even in terms of the majority's analysis, "whether the district court *properly* refused to stay the limitation proceeding." (Emphasis supplied)

I close with a quotation from a law review comment, Application of the Forum Clause to Commercial contracts, 8 Houston L. Rev. 738, 752 (1971), that appeared after the Court had held its en banc conference on this case:

> VII. Summary
>
> Forum clauses were once "taboo" in American courts. Since 1949, however, courts have been more conciliatory toward these contractual provisions. The "ouster" rationale — used in most pre-Krenger[6] decisions as a basis for rejecting forum clauses — has been discarded in large measure. The "reasonableness" test, developed in Muller[7], gives prima facie validity to forum clauses and places the onus on the plaintiff to show that the clause is unreasonable. This test has been accepted by the latest

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lawfully open to him . . . In truth, I do not believe that, today at least, there is an absolute taboo against such contracts at all: in the words of the Restatement, they are invalid only when unreasonable. . .

[7]Muller & Company v. Swedish American Lines Ltd., 2 Cir. 1955, 224 F.2d 806, *cert. denied*, 1955, 350 U.S. 903, held that courts should enforce a forum clause in an international contract unless it is unreasonable or prohibited by statute. The court pointed out that the burden of proving that the clause is unreasonable, however, is on the plaintiffs, and since the plaintiff received contract consideration for the agreement to litigate all claims in the stipulated forum, "mere inconvenience or additional expense is not the test of unreasonableness. . .The plaintiff cannot prevail in derogation of the forum clause if the stipulated forum is available and can render "substantial justice" to him.

In the instant case, the majority stated that Indussa Corporation v. S.S. Ranborg, 2 Cir. 1967, 377 F.2d 200, overruled this part of *Muller*. But *Indussa's* decision not to enforce a forum clause derived from its view that the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15, where applicable, prohibited such clauses. COGSA did apply to *Muller* (as it did to Carbon Black) and for that reason *Muller* was overruled.

revision of the *Restatement,* the majority of the courts which recently have considered forum clauses, and most of the legal scholars who have written on the problem. Acceptance of the prima facie validity of forum clauses has these advantages: (1) it vitiates the legal fiction of ouster; (2) it reinforces the principle of party autonomy; and (3) it gives discretion to the trial judge who may weigh all the equities. Since the *Muller* test is basically one of discretion, there is always the danger of abuse, especially from jurists who wish to assure to parties who reside within their jurisdiction an open court. On balance, however, the *Muller* test is sound, and it is difficult to imagine any court long rejecting a criterion which is universally referred to as the "reasonableness" test.

The decision of the majority is a backward step by a forward-looking court. It has no place in a shrinking world where international commercial transactions are becoming increasingly commonplace. The safeguard against abuse of the forum clause is the local court's power to determine the reasonableness of enforcing the clause. But the burden of proving unreasonableness should fall on the party seeking to escape from the obligation he contracted to undertake. Zapata has failed to show any good reason for backing out of its bargain.

SIMPSON, Circuit Judge, dissenting:

I respectfully dissent, for the reasons set forth in Judge Wisdom's dissent from the panel decision In the Matter of the Complaint of UNTERWESER REEDEREI, GMBH, ZAPATA OFF-SHORE COMPANY v. M/S BREMEN and UNTERWESER REEDEREI, GMBH, 5 Cir. 1970, ____ F.2d ____ [No. 27,497, June 19, 1970].

APPENDIX C

MEMORANDUM AND ORDER
OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF UNTERWESER REEDEREI, GMBH, for Exoneration from, or Limitation of Liability as Owner of the M/S BREMEN

NO. 68-290-Civ-T

MEMORANDUM AND ORDER

Defendant, a German corporation, appearing in its own behalf and as owner of the ocean-going tug M/S BREMEN, has moved the Court to decline jurisdiction and dismiss a maritime claim in a cause of breach of cantract and tort brought by Plaintiff, a Delaware coorporation, the owner of the Drill Barge (Rig) CHAPARRAL, or alternatively to decline jurisdiction or to stay proceedings.

The claim grows out of a casualty which occurred during performance of a towage contract executed in Bremen, Germany. By the contract Defendant agreed to tow Plaintiff's drill barge from Venice, Louisiana, to Ravenna, Italy. In course of the tow voyage, the drill barge suffered a casualty and was towed into Tampa, Florida, by the Defendant's tug. On arrival at Tampa, Florida, Plaintiff caused the tug to be arrested by the United States Marshal pursuant to practice in admiralty proceedings.

Defendant urges that a paragraph of the Towage Contract, which provides:

> "Any dispute arising must be treated before the London Court of Justice"

defeats the jurisdiction of this Court and buttresses its position by seeking application of the doctrine of forum non conveniens. Its first contention is opposed by *Carbon Black Export, Inc. v. The Monrosa,* 254 F.2d 297 (5C. 1958), affirmed, 359 U.S. 999 (1959).

Even *Wm. H. Muller & Co. v. Swedish American Line, Ltd.,* 224 F.2d 806 (2 C. 1955), which under different facts held otherwise, recognizes that a similar clause does not defeat jurisdiction and held that jurisdiction should be declined only after a finding that the agreement is reasonable in a particular case.

Helpful criteria to be considered are given in *Mobile Tankers, S.A. v. Mene Grande Oil Co.,* 363 F.2d 611 (3 C. 1966), cert. denied, 385 U.S. 945 (1966):

> "The factors which must be considered and weighed include the following: libelant's choice of forum; status of the parties; convenience of parties and witnesses; access to sources of proof; cost of obtaining the attendance of willing witnesses; possibility of a view of the premises, if appropriate; relative advantages and obstacles to a fair trial; and, possible difficulty in the application of foreign law. Unless 'the balance is strongly in favor of the [Respondent], [the libellant's] choice of forum should rarely be disturbed.' *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)."

The citizenship of the parties has been given. Plaintiff chose and obtained the jurisdiction of this Court. The prelude, including a partial performance, alleged casualty and aftermath here all occurred along or near the Gulf Coast of the United States of America and within or adjacent to the jurisdiction of the judicial circuit of which this Court is a part.

A great majority, if not all, of the witnesses are or were in the United States, including an alleged forty potential witnesses residing permanently here. Members of the Bar of this Court have spent considerable time in the investigation and preparation of the trial of this case, 33 oral depositions have been taken, including all of the officers and members of the crew of Defendant's tug and the Defendant's riding crew on Plaintiff's drill barge. Defendant itself has taken oral depositions and with the aid of this Court obtained production of documents, plans and other data.

Plaintiff has made an undisputed showing that English courts apply different tests and rules of liability in cases of this type than do many of the courts of this country.

The contract is printed in English and in any event interpreters would probably have to be used in taking testimony of the German crew, whether this cause is tried here or in England.

Defendant has not suggested and there is no showing that American courts are not capable of adjudicating this case fairly and justly. The balance of conveniences here is not strongly in favor of Defendant and Plaintiff's choice of forum should not be disturbed.

For the reasons given, Defendant's Motions to Dismiss for Lack of Jurisdiction, Requesting the Court to Decline Jurisdiction on Grounds of Forum Non Conveniens, and alternatively to stay further prosecution of these proceedings pending adjudication in England be, and they are each, DENIED.

DONE and ORDERED at Tampa, Florida, this 29th day of July, 1968.

Ben Krentzman
UNITED STATES DISTRICT JUDGE

APPENDIX D

FINAL ORDER
OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF UNTERWESER REEDEREI, GMBH, for Exoneration from, or Limitation of Liability as Owner of the M/S BREMEN

NO. 68-290-Civ-T

ORDER

THIS CAUSE came on for consideration upon a Motion for Injunction filed by Zapata Offshore Company, claimant, and a Motion to Stay filed by Unterweser Reederei, plaintiff. The Court having reviewed the excellent briefs submitted and having heard argument of counsel, determines that the injunction prayed for should be granted, and the Motion to stay should be denied. As the basis for this determination the Court makes the following observations and conclusions.

I
STATUS OF PROCEEDING

The present controversy finds its origin in a mishap that occurred in the Gulf of Mexico on January 9, 1968. On January 12, 1968, Zapata Off-Shore Company filed its complaint against Unterweser Reederei, GMBH and the M/S BREMEN in this Court, the case being docketed as 68-21 Civ. T., for damages allegedly sustained by its drill rig CHAPARRAL while in tow of Unterweser's Tug BREMEN. Unterweser responded to the complaint by filing a motion to dismiss for lack of jurisdiction, contending that by virtue of a provision

in the towage contract with Zapata the forum for any litigation should be the "London Court of Justice." The motion sought, alternatively, an order declining jurisdiction or an order staying further prosecution of proceedings in 68-21 Civ. T. The Court denied these motions in its Order of July 29, 1968.

After the Zapata complaint was filed in this Court, Unterweser instituted an action against Zapata in the High Court of Justice in London, England, February 21, 1968. In the London suit Unterweser claimed hire and other moneys due under said contract of towage and for damages for breach of contract. Later, on July 2, 1968, Unterweser filed its complaint in this cause, 68-290 Civ T. seeking exoneration from or limitation of liability arising out of the mishap of January 9, 1968. On July 5, 1968, the Court entered an injunction restraining the prosecution of all other claims and proceedings arising from the events occurring on January 9, 1968.

On July 8, 1968, Zapata filed its claim in this action asserting the same cause of action as alleged in its original complaint in 68-21 Civ. T., and on July 24, 1968, Zapata filed its answer to the complaint.

On August 28, 1968, Unterweser filed its objection to Zapata's claim and also its counterclaim against Zapata, alleging in Count I the same claim as asserted by it in the London suit above mentioned. and in Court II Unterweser alleged a salvage cause of action.

Unterweser continued to pursue its action in the London Court and Zapata sought injunction relief in this Court on September 19, 1968. Unterweser has responded and on October 2, 1968, moved to stay further prosecution of the claim filed by Zapata in this suit. Zapata has not filed answer in the London Court and has not joined issue.

Unterweser states the issue to be decided by the Court thusly:

"Whether a District Court sitting in Admiralty in a limitation proceeding has jurisdiction under any circumstances, to enjoin the petitioner in the limitation proceedings from prosecution of an action in a foreign country against a claimant in the limitation action?"

Limitation proceedings are considered to be equitable in nature. Cases: *A. C. Dodge, Inc. v. Carras*, 218 F.2d 911 (2 Cir. 1955); *The Salvore*, 36 F.2d 712 (2 Cir. 1929); *Hartford Accident & Indemnity Co. v. Southern Pacific Co.* 273 U.S. 207, 1927; *Benedict on Admiralty*, § 479 (6th Ed. 1940).

The Court having once taken jurisdiction in the limitation proceedings may proceed to determine all matters relating to the controversy. As stated in *Hartford Accident Co. v. Southern Pacific Co., supra*, the limitation action is:

". . an equitable suit to the extent that the Admiralty Court, having the broadest of powers to do exact justice between the parties, may take any such action in the case as justice demands . ."

The question of enjoining prosecution of litigation in another forum has been considered in several of the above cases. It seems clear that *one*, when seeking to take advantage of the limitation statutes, § 181 et seq. Title 46, U.S.C. should be required to "do equity" by refraining from litigating the same controversy in other courts. The cases on this issue all regard the determination of whether or not the ship owner may be allowed to proceed simultaneously in the other forum as being based upon equitable considerations. In *the Salvore, supra*, and *A. C. Dodge v. Carras, supra*, the Second Circuit Court of Appeals held that the ship owner could not seek limitation of or exoneration from liability in the District Court while at the same time litigating in other courts. A contrary result was reached in Petition of *A/S J. Ludwig Mowinckel Rederei*, 268 F.Supp.

682, (So. Dist. N.Y. 1967). In that case the collision occurred off the coast of France and action was started in England in the High Court of Justice and the court pointed out that many of the claims were being litigated in the London Court. The Court also pointed out that since other suits by cargo claimants against both ship owners were pending in the French Courts, there could not possibly be one jurisdiction in which a concourse of all claims arising out of the collision could be established. The Court acknowledged that it had the power to grant an injunction in such a case but declined doing so stating that the equitable considerations invoked by the moving party were not impressive. This case certainly does not stand for the proposition that the District Court is without power to grant an injunction in such a case, it merely states that the exercise of the power should be based on equitable facets of the particular case. It is clear from *The Salvore*, *Dodge* and *Mowinckel* cases that the District Court can indeed restrain the petitioner seeking limitation from prosecuting an action based on the same events in another forum.

In seeking the benefits of the Limitation Act, Unterweser should recognize that this Court has jurisdiction, to determine the entire controversy. In aid of this jurisdiction, it may be, and it is, in this case, necessary to require that duplicity of litigation be terminated. This case is unlike cases where there are numerous claimants proceeding in several forums simultaneously. In the case at bar there are only two parties litigating the dispute occasioned by the events of January 9, 1968. Suit was initially filed in this Court, this Court has ruled that it does have jurisdiction over the controversy, and this Court also has taken jurisdiction in the limitation action. The proposition that the case should at the same time be prosecuted in another forum is not well received.

Although Unterweser again argues in its Motion to Stay that the venue provisions of the towage contract are controlling, this Court has already passed on that

contention. While at that time the Court did not rule that Unterweser could not proceed with an action in the London Court, the same considerations recited as a basis for retaining jurisdiction in the Order of July 29, 1968, are determinative of this issue. In addition, Unterweser has voluntarily invoked this Court's jurisdiction in filing this limitation proceeding in which Zapata has filed claim and answer and joined issue, and also Unterweser has invoked this Court's jurisdiction in filing its counterclaim against Zapata upon which issue has also been joined.

This court having first acquired jurisdiction over the parties and the subject matter of this controversy both through the complaint in 68-21 Civ. T. and the limitation action filed by Unterweser in this cause, does have the power to restrain the parties before it from litigating the same matters elsewhere. See: 43 C.J.S. Injunctions, § 49; 28 Am. Jur., Injunctions, § 214; and Modern Federal Practice Digest, Courts, § 492, pocket parts pages 266-267.

The balance of convenience is strongly in favor of litigation in this forum initially and to allow the same action to be prosecuted simultaneously elsewhere would cause inequitable hardship. Such an action could only tend to frustrate and delay the speedy and efficient determination of the cause in this Court. The Court feels that the parties being properly before it should be restrained from proceeding further in the foreign court.

Although Unterweser quite correctly points out that this Court cannot act extraterritorially, the Court does have the power to control the actions of those properly before it. Unterweser, having been brought into the jurisdiction of this Court in 68-21 Civ. T., and having further affirmatively invoked this Court's jurisdiction in the limitation proceeding, is subject to the Court's direction. The Court does not attempt to control the actions of the London High Court of Justice, or any other

foreign tribunal for that matter, but it does hereby restrain Unterweser from proceeding further in litigating this action anywhere else until this Court has made its determination.

Having made these determinations and being otherwise advised in the premises, it is, therefore,

ORDERED and ADJUDGED:

1. That the motion for injunction filed by Zapata Off-Shore Company is GRANTED.

2. That the parties in this cause, Unterweser Reederei, GMBH and Zapata Off-Shore Company, are hereby enjoined from proceeding any further in litigating any and all matters relating to this controversy in other jurisdictions (including that certain action now pending in the High Court of Justice, Probate, Divorce and Admiralty Division (Admiralty), London, England, 1968 Folio 64, styled "Unterweser Reederei, GMBH v. Zapata Off-Shore Company") until such time as this Court has made its determination in the case presently before it. A certified copy of this Order may, however, be filed with or otherwise brought to the attention of the High Court of Justice in London.

3. That the motion for stay filed in this cause by Unterweser Reederei, GMBH be and the same is hereby DENIED.

DONE and ORDERED at Tampa, Florida, this 21st day of January, 1969.

Ben Krentzman
BEN KRENTZMAN
UNITED STATES DISTRICT JUDGE

APPENDIX E

OPINION OF THE SUPREME COURT
OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION
ROYAL COURTS OF JUSTICE
LONDON, ENGLAND

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT
MIT BESCHRANKFER HAFTUNG

Plaintiffs

and

ZAPATA OFF-SHORE COMPANY

Defendants

"THE CHAPARRAL"

JUDGMENT

REVISED 1968. Folio 64.

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL
CIVIL DIVISION

Royal Courts of Justice,
Tuesday, 23rd July, 1968.

Before:

LORD JUSTICE WILLMER,
LORD JUSTICE DIPLOCK and
LORD JUSTICE WIDGERY.

Between:

UNTERWESER REEDEREI GESELLSCHAFT
MIT BESCHRANKFER HAFTUNG

Plaintiffs

and

ZAPATA OFF-SHORE COMPANY

Defendants

"THE CHAPARRAL"

(Transcript of the Shorthand Notes of THE ASSOCIATION OF OFFICIAL SHORTHANDWRITERS, LIMITED, Room No. 392, Royal Courts of Justice, and No. 2, New Square, Lincoln's Inn, London, W.C.2).

Mr. ANTHONY J. L. LLOYD, Q.C., and Mr. JULIAN H. S. COOKE (instructed by Messrs Richards & Butler) appeared on behalf of the Plaintiffs (Respondents).

Mr. FRANCIS P. NEILL, Q.C., and Mr. KENNETH S. ROKISON (instructed by Messrs Thomas Cooper & Co.) appeared on behalf of the Defendants (Appellants).

JUDGMENT

LORD JUSTICE WILLMER: We need not trouble you further, Mr. Lloyd.

This is an application for leave to appeal from an order made by Mr. Justice Karminski on the 4th June last whereby he dismissed the defendants' application to set aside an order of the learned registrar giving leave to serve a writ out of the jurisdiction. In order to deal with the application it has been necessary to go into all the circumstances of the case and in substance to hear the appeal.

The question at issue between the parties arises out of a marine casualty which took place in January of this year. The plaintiffs are well known towage contractors and owners of a tug called the BREMEN. The defendants are a company incorporated in the United States of America who carry on business *inter alia* in the operation of oil rigs.

In November 1967 the plaintiffs and the defendants entered into a contract in writing for the towage of an oil rig called the CHAPARRAL belonging to the defendants from a place called Venice in Louisiana to Ravenna in Italy by the tug BREMEN. We have been referred to a number of clauses in the contract, only one of which need be mentioned now. The concluding provision of the contract was: "Any dispute arising must be treated before the London Court of Justice".

The towage from Venice began on the 4th January this year. By the 9th January, when the tow was still within the Gulf of Mexico, disaster overtook it, and it

was necessary to take refuge in the port of Tampa in Florida. Each party blamed the other for the disaster which occurred, and each has asserted a claim for damages. The plaintiff tug owners say that the defendants were at fault in that the oil rig being towed was not in a seaworthy condition. The defendants on their part say that the tug was not seaworthy to undertake the voyage, and also that it was negligently operated. There are all the elements present for an interesting battle to ascertain whose fault it was. The defendants got their blow in first, because immediately upon arrival of the tug and tow at Tampa they instituted proceedings in admiralty in the United States District Court at Tampa, and in the course of those proceedings the tug was arrested. The release of the tug was eventually obtained upon security being furnished satisfactory to the defendants in the sum of $3,500,000.

On the 21st February 1968 the plaintiffs issued the writ in the present action and sought leave to serve that writ out of the jurisdiction on the American owners of the oil rig. Leave to serve the writ out of the jurisdiction was obtained from the learned registrar, and it was that matter which came before the learned judge. The grounds upon which the plaintiffs sought leave to serve the writ out of the jurisdiction were, first, that the contract was one which "by its terms, or by implication, was governed by English law", and secondly, that the contract contained an express term to the effect that the High Court should have jurisdiction.

In the meantime, however, the present plaintiffs had taken steps to defend themselves in the proceedings which were being carried on in Tampa. Those proceedings involved taking depositions from a number of witnesses, and in that operation both the present plaintiffs and the present defendants took part. Depositions appear to have been taken from a considerable number of witnesses. But from an early date the plaintiffs took exception to the jurisdiction of the court at Tampa and instituted proceedings to set aside or stay the Ameri-

can action. Those proceedings came before the United States District Court in Tampa on the 28th April of this year, when judgment was reserved. Up to date, so far as we have been informed, no judgment has yet been delivered, and it is not, therefore, known whether the action instituted by the defendants in America will be set aside or stayed. At present, however, assuming that leave to serve this writ out of the jurisdiction stands, there is a situation when proceedings are on foot in both countries. The position is further complicated by the fact that, just before the matter came before Mr. Justice Karminski at the beginning of this month, the plaintiffs launched proceedings for exoneration or limitation of their liability in the United States of America. It is to be pointed out that that is a course which they had to take (if the American proceedings were allowed to continue) within six months of the institution of those proceedings. Time was running out against them, and they were, therefore, forced to institute those proceedings at the beginning of this month in order to preserve their rights.

The learned judge knew of the institution of those proceedings, but he did not actually know (although I have no doubt that he had good reason to suspect) that immediately following the institution of those proceedings an order would be made by the American court which, amongst other things, enjoined the defendants against prosecuting any claim of theirs against the plaintiffs pending the determination of the plaintiffs' limitation proceedings. That, it has been said, would effectively prevent the defendants, if they were so minded, from putting forward a counterclaim in any proceedings in this country. That is a matter much relied upon by the defendants as showing that, as a matter of convenience, and in order to avoid duplication of proceedings, leave ought not to be granted to serve this writ out of the jurisdiction.

Reliance is also placed upon the fact that, under American procedure, it appears that a party sued as a

defendant there (as are the present plaintiffs) who has a counterclaim against the plaintiff in that country is compelled to assert that counterclaim within a certain limit of time, or he will be for all time barred. That is another reason why it is suggested on behalf of the defendants that, as a matter of convenience, proceedings ought not to be allowed to continue in this country, since it is said that it will be necessary for the present plaintiffs to assert their claim by way of counterclaim in the United States.

The law on the subject, I think, is not open to doubt, and I do not think that it is really necessary to cite the authorities to which we have been referred. It is always open to parties to stipulate (as they did in this case) that a particular court shall have jurisdiction over any dispute arising out of their contract. Here the parties chose to stipulate that disputes were to be referred to the "London" court, which I take as meaning the High Court in this country. *Prima facie* it is the policy of the court to hold parties to the bargain into which they have entered. *Prima facie* it is to be presumed, therefore, that the plaintiffs should have leave to prosecute their proceedings in this country, and in pursuance of that to serve their writ out of the jurisdiction. But that is not an inflexible rule, as was shown, for instance, by the case of *THE FEHMARN*, in which I was myself concerned, and which came to this court. That was a case in which the court in its discretion declined to give effect to a stipulation made by the parties in their contract conferring jurisdiction on a foreign court.

I approach the matter, therefore, in this way, that the court has a discretion, but it is a discretion which, in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding parties to their bargain. The question is whether sufficient circumstances have been shown to exist in this case to make it desirable, on the grounds of balance of convenience, that proceedings should not take place in

this country, the stipulated forum, but that the parties should be left to fight their battles in the United States of America.

The learned judge in his discretion came to the conclusion that it was proper to grant leave to serve the writ out of the jurisdiction so that the action might proceed in this country. We in this court should not interfere with the judge's exercise of his discretion unless it is shown that he acted on some wrong principle, or misapprehended the facts, or unless it is shown that his exercise of his discretion was plainly wrong.

It is said that the situation has to some extent altered, since the time when the learned judge had the matter before him, by reason particularly of the plaintiffs' institution of exoneration and limitation proceedings in the United States to which I have referred. That is the only new factor which has arisen since the time when the learned judge delivered his judgment.

I am unable to see that the judge acted on any wrong principle. I do not think that the new facts said to have been brought to light really alter the complexion of the case to any material extent, nor am I prepared to say that the judge's exercise of his discretion is shown to have been plainly wrong.

I should record the fact that in an affidavit put in on behalf of the plaintiffs today the offer is made (and Mr. Lloyd on behalf of the plaintiffs has renewed it in the course of the argument to waive the provisions of the restraining order which has been obtained by the plaintiffs in the United States so as to relieve the defendants of any difficulty which they might otherwise have in putting forward a counterclaim in this country if they want to. I should also record the fact that an offer has been made on behalf of the plaintiffs (which still holds good) to hold the security which has been furnished in America as available to cover any counterclaim which may be brought in this country. I refer to

those two circumstances because I think that they are in their turn relevant to the question whether it is right to allow these plaintiffs to pursue their action in this country in accordance with their contractual bargain. I think that it is, and that the learned judge reached the right conclusion.

In the circumstances I think that the appropriate order for us to make is that the defendants be granted leave to appeal, but that the appeal will be dismissed.

LORD JUSTICE DIPLOCK: I agree, and add very little.

It has long been recornised that the jurisdiction of the High Court to give leave for service of a writ, or notice of a writ, out of the jurisdiction under Order 11, rule 1, is one which should be exercised with caution, because there are circumstances set out in that rule in which service outside the jurisdiction is authorized which are in conflict with the ordinary rules of comite, that is to say, the courts in this country assert a jurisdiction in themselves wider than that which they recognise in the courts of other countries. That need for caution has been frequently expressed. It was expressed by Lord Justice Farwell fifty years ago in *THE HAGEN*, reported in 1908 Probate Division, 189, at page 201, and has been re-asserted fairly recently by this court in 1967 in *Mackender v. Feldia A. G.* reported in 1967 2 Queen's Bench Division, 590.

Those observations should be read in relation to an application for service out of the jurisdiction under rule 1. Rule 2, which is a separate rule and applies to this case, authorises service out of the jurisdiction where the contract contains a term to the effect that the High Court has jurisdiction to hear and determine any action in respect to the contract. This does not raise any question of conflict with ordinary comity because, so far as I know, it is the policy of the courts of most countries, if it be reasonable at any rate to do so, to see that parties keep their word; and having had the priv-

ilege of reading a memorandum brief which has been accepted in the Federal District Court at Tampa on behalf of the plaintiffs in this action, it looks to me as of there is some ground at any rate for saying that the Federal courts and State courts in the United States take the same view.

When it comes to a case under Order 11, rule 2, as distinct from a case under Order 11, rule 1, I say again in this case, as I said in *Mackender*: "Where parties have agreed to submit all their disputes under a contract to the exclusive jurisdiction of a foreign court, I myself should require very strong reason to induce me to permit one of them to go back on his word". We should, I think, apply the same principle whether the forum of contractual choice is England or of some other country. The question arises more frequently before us where the forum of contractual choice is some other country, as in *Mackender's* case, where the choice was Belgium. In the present case the choice of the parties was the English court and, as I say, I should myself require strong grounds for saying that one of the parties should not keep his word.

There is, of course, undoubtedly a discretion on the part of the court in this case to refuse to allow service of the writ outside the jurisdiction despite the contractual term in the contract. The learned judge from whom this appeal is brought recognised that he had a discretion. So far as I can see he applied his mind to all the relevant matters and, even if I myself might have come to some other conclusion, I do not think that any ground has been put forward which would justify the court in interfering with his discretion. Having said that, let me say (as must have been apparent during the course of this hearing) that I agree entirely with his decision. I should have done the same myself.

LORD JUSTICE WIDGERY: I agree with both judgments. The parties here have quite deliberately chosen that their disputes shall be decided in the courts of this

country, and it would need strong grounds in my view to deprive either party who sought to take advantage of that course from receiving the advantage which he expects from it. I also would put my decision on the footing that there is no reason here to suppose that the learned judge exercised his discretion improperly. But, like my Lord, I feel that had I had to decide the matter myself, I should have reached precisely the same conclusion.

I also would dismiss this appeal.

Mr. LLOYD: I have to ask for the costs of the appeal, my Lord.

LORD JUSTICE WILLMER: Yes, I think that follows.

Mr. NEILL: As a matter of technicality, I think that two of your Lordships said "Appeal dismissed". Does it follow, my Lord, that you granted leave to appeal?

LORD JUSTICE WILLMER: Thank you for reminding me; I am afraid that it had slipped my mind that the whole matter was before us.

Mr. NEILL: Sometimes the two arguments run into one another, and that did happen here.

Mr. LLOYD: I would rather like your Lordships to say that this is a case in which leave should not be given, though I do not think that it very much matters. There is the danger that leave will be treated as being automatic. I would submit that leave was required, and the learned judge who heard the case did refuse leave. I ask your Lordships, having heard my friend's argument, to say that leave ought not to be given.

LORD JUSTICE DIPLOCK: You have had a long obiter judgment, Mr. Lloyd.

(Their Lordships conferred).

LORD JUSTICE WILLMER: I think that is right. I think that we must grant leave, but on the hearing of the appeal we dismiss the appeal.

LORD JUSTICE DIPLOCK: Costs will probably tax higher on that footing.

Mr. LLOYD: I suppose there will be some separate costs of the application for leave to appeal.

LORD JUSTICE WILLMER: Well, there was a notice of motion; I do not know how much costs that carries.

APPENDIX F

ORDER GRANTING REHEARING EN BANC

F-2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 27497

In the Matter of the Complaint of
UNTERWESER REEDEREI, GmbH,

ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee

versus

M/S BREMEN and UNTERWESER REEDEREI GmbH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK and INGRAHAM, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc on briefs without oral argument. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX G

JUDGMENT ON REHEARING EN BANC AND MANDATE

G-2

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

October Term, 1969

No. 27497

D. C. Docket No. Civ. 68-290-T & 68-21-T
In the Matter of the Complaint of

UNTERWESER REEDEREI, GMBH
ZAPATA OFF-SHORE COMPANY,
Plaintiff-Appellee,

versus

M/S BREMEN and
UNTERWESER REEDEREI GMBH,
Defendants-Appellants.

Appeal from the United States District Court for the Middle District of Florida

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Before BROWN, Chief Judge, WISDOM, GEWIN, BELL,* THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc without oral argument.

ON CONSIDERATION of this cause en banc the Court adopts the majority opinion and judgment of the panel dated June 19, 1970, and the order of the District Court appealed from in this cause, be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiff-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 28, 1970

WISDOM, Circuit Judge, dissenting, joined by Judges Thornberry, Goldberg, Godbold, Simpson and Clark:
SIMPSON, Circuit Judge, disssenting:
Issued As Mandate: Jul 20 1971

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*Judge Bell did not participate in the consideration or decision of this case.